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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 16814 (CIVIL)

DONALD I. TILTON,
APPELLANT,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
APPELLEE

No. 16815 (CIVIL)

WILFRED L. BECK, JR.,
APPELLANT,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
APPELLEE

No. 16816 (CIVIL)

GUY H. McCLEARN, JR.,
APPELLANT,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

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Docket Entries
(Consolidated)

Date 1959	Proceedings
Oct. 15	Complaint filed & summons issd.
Oct. 22	Marshal's return to summons, etc., filed. (Executed on deft. by serving Mark M. Hennelly, Gen'l Solicitor on 10-20-59).
Oct. 30	Amended complaint filed by pltff.
Nov. 9	Motion of deft. for consolidation of cases 59C 301(2), 59C 302(1) and 59C 303(3) for the purposes of trial, filed. Motion of deft. to dismiss complaint and amended complaint, with attached supporting memo., filed.
Nov. 12	Order filed & entered sustaining joint motion of deft. to consolidate cases 59C 301(2), 302(1) and 303(3) and directing case 59C 302(1) be transferred from Court One to Court 2; that case 59C 303(3) be transferred from Court 3 to Court 2, for consolidation of such cases for trial in Court 2. Notices thereof mailed to Harry Richards & M. M. Hennelly.
Nov. 19	Mo. to dismiss & entire file to Judge Harper.
Dec. 11	Second amended petition filed.
Dec. 17	Order filed in consolidated cases 59C 301, 302 and 303 overruling separate motions of deft. heretofore filed to dismiss each of said cases, pltff. having filed a second amended complaint in each case. Notices thereof mailed to Harry Richards and M. M. Hennelly.
Dec. 24	Answer to second amended complaint & counterclaim & cross-claim in interpleader of deft. filed.

Date	Proceedings
1960	
Jan. 4	Pltffs' Memorandum in opposition to deft's motions to order additional parties brought in as defendants filed in consolidated cases 59C 301 & 303. Pltff's reply to deft's counterclaim filed in case 59C 301. Pltff's Memorandum in opposition to deft's motion for transfer of action, filed in case 59C 302. Pltff's reply to deft's counterclaim filed in case 59C 303.
Jan. 26	Order filed overruling separate motions of deft. (1) to bring in additional parties in cases Nos. 59C 301(2) and 59C 303(2) and (2) to transfer case No. 59C 302(2). Copies of order mailed to W. Francis Murrell and R. W. Yost.
Jan. 28	Set for May 12, 1960.
Feb. 25	Motion of deft. to set aside the Court's order on deft's motion to bring in additional parties, or, in the alternative, to modify said order, with attached supporting brief, filed in consolidated cases 59C 301 and 303.
Mar. 4	Pltffs' Memorandum in opposition to deft's motion to set aside or modify the Court's order on deft's motion to bring in additional parties, filed in consolidated cases 59C 301 and 303.
May 2	Consolidated cases 59C 301, 302 and 303 set for pre-trial conference on May 6, 1960 at 2:00 P.M. Notices thereof mailed to Francis F. Murrell and M. M. Hennelly.
May 6	Pre-trial conference had.

Date	Proceedings
1960	
May 12	Consolidated cases Nos. 59C 301, 302 & 303 having heretofore been set for trial this day, parties appear by counsel & announce ready. Separate motions of deft. filed in each of aforesaid cases for leave to amend its answer by deletion & interlineation filed, presented & granted. Stipulation as to certain facts filed. The introduction of evidence on behalf of pltffs. on trial of consolidated causes is commenced & concluded. Introduction of evidence on behalf of deft. is commenced & concluded & introduction of evidence in rebuttal on behalf of pltffs. is commenced, but not concluded & further hearing on final testimony passed to Friday, June 3, 1960.
Jun. 3	Further proceedings on trial of consolidated causes before the Court reset for Friday, June 17, 1960.
Jun. 16	Depositions (1 vol.) of witnesses Fred W. Ford, et al, filed jointly in case nos. 59C 301, 59C 302 & 59C 303.
Jun. 17	Final hearing in the above-consolidated causes resumed & concluded, Pltffs. granted 30 days after receipt of reporter's transcript to submit initial brief; deft. 30 days thereafter to present answering brief, and pltff. 15 days thereafter to present reply brief. Upon receipt of all briefs cause to be submitted.
Jun. 20	Marshal's return on subpoena addressed to Carl B. Edwards, filed and executed; served June 15, 1960.
Aug. 25	On appln., deft. granted an addnl. 7 days, or until Sept. 2nd within which to file brief in consolidated cases 59C 301, 302 & 303.

Date	Proceedings
1961	
Mar. 6	Memo. Opinion filed in consolidated cases 59C 301, 2 & 3, finding issues in favor of the deft. & directing attys. for the deft. to prepare findings of fact, conclusions of law & judg. for signature & entry by the Court.
	Copies thereof mailed by the Court to R. W. Yost, Harper Barnes and Francis Murrell.
Apr. 12	Motion of pltffs. for addnl. findings of fact in consolidated cases 59C 301, 302 & 303, filed.
May 3	Order filed in consolidated cases 59C 301, 302 & 303 overruling motion of pltffs. heretofore filed for addnl. findings of fact.
	Findings of Fact & Conclusions of Law filed in said consolidated cases, adopting the stip of facts filed herein by the parties & the Memo. Opinion filed by the Court, & Judg. in accordance therewith filed & entered decreeing pltffs. shall not have any relief in these cases & dismissing each action on the merits.
	Copies of Order & Judg., together with transmittal letter, mailed to R. W. Yost and to Francis Murrell.
May 26	Notice of appeal of plaintiff from judgment entered May 3, 1961. Copy of notice mailed to Robert W. Yost, atty. for defendant.
July 3	Pltffs' designation of contents of record on appeal in consolidated cases 59C 301, 302 & 303 filed.
July 5	Certified copy of Notice of Appeal together with two certified copies of Clerk's Docket entries delivered to Clerk, C. C. A., 8th Circuit.

Complaint (Tilton Case)

(Filed in U. S. District Court—October 15, 1959)

Comes now the plaintiff and for his cause of action herein states:

1. Jurisdiction of this action is conferred upon the Court by Section 9 of the Universal Military Training and Service Act (Act of June 24, 1948, c. 625, Title I Section 9, 62 Stat. 614, as amended; 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Section 9(c)(1) of the Act relating to seniority rights.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court.

4. Plaintiff was originally employed by the defendant in July, 1949, at its place of business in Kansas City, Missouri. On April 1, 1950, plaintiff was promoted to the position of upgraded helper, a position the duties and functions of which were other than temporary, and plaintiff continued in such position until his induction into the Armed Forces. On October 16, 1950 plaintiff was inducted into the Armed Forces.

5. Plaintiff was honorably discharged from the Armed Forces on December 21, 1951 and possesses a certificate of satisfactory performance of military service and has otherwise met all the requirements of Section 9 of the Act.

6. Plaintiff, on January 2, 1952, returned to the employment of the defendant and was reinstated as upgraded helper. On August 28, 1956, plaintiff met all the requirements for and was promoted to the position of carman. Defendant established the date of plaintiff's seniority in the position of carman as August 28, 1956, the date of promotion. Plaintiff states that this is in violation of the reemployment rights under Section 9(c)(1) of the Act, which entitled him to have his seniority established from the date on which he would have qualified for the position for car-

man, April 1, 1953, had he not been inducted into the Armed Forces.

WHEREFORE, Plaintiff prays judgment against the defendant, requiring the defendant to restore to plaintiff his rightful seniority status, together with any pay or additional sums of money that he might be entitled to, due to the unlawful withholding of his seniority rights, and such other and further relief as the Court may deem just and proper, and for costs.

COMPLAINT (BECK CASE)

(Filed in U. S. District Court—October 15, 1959)

Comes now the plaintiff and for his cause of action herein states:

1. Jurisdiction of this action is conferred upon the Court by Section 9 of the Universal Military Training and Service Act (Act of June 24, 1948, c. 625, Title I Section 9, 62 Stat. 614 as amended; 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Section 9(c)(1) of the Act relating to seniority rights.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court.

4. Plaintiff was originally employed by the defendant on May 12, 1950, at its place of business in Alexandria, Louisiana. On October 12, 1951, plaintiff was promoted to the position of upgraded helper, a position the duties and functions of which were other than temporary, and plaintiff continued in such position until his induction into the Armed Forces. On March 3, 1955 plaintiff was inducted into the Armed Forces.

5. Plaintiff was honorably discharged from the Armed Forces on March 1, 1957 and possesses a certificate of satisfactory performance of military service and has otherwise met all the requirements of Section 9 of the Act.

6. Plaintiff, on March 9, 1957, returned to the employment of the defendant and was reinstated as upgraded helper. On December 5, 1957, plaintiff met all the requirements for and was promoted to the position of carman. Defendant established the date of plaintiff's seniority in the position of carman as December 5, 1957, the date of promotion. Plaintiff states that this is in violation of the reemployment rights under Section 9(c)(1) of the Act, which entitled him to have his seniority established from the date on which he would have qualified for the position of carman, December 5, 1955, had he not been inducted into the Armed Forces.

WHEREFORE, Plaintiff prays judgment against the defendant, requiring the defendant to restore to plaintiff his rightful seniority status, together with any pay or additional sums of money that he might be entitled to, due to the unlawful withholding of his seniority rights, and such other and further relief as the Court may deem just and proper, and for costs.

COMPLAINT (MCCLEARN CASE).

(Filed in U. S. District Court—October 15, 1959)

Comes now the plaintiff and for his cause of action herein states:

1. Jurisdiction of this action is conferred upon the Court by Section 9 of the Universal Military Training and Services Act (Act of June 24, 1948, c. 625, Title I Section 9, 62 Stat. 614, as amended; 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Section 9(c)(1) of the Act relating to seniority rights.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this court.

4. Plaintiff was originally employed by the defendant on May 24, 1950, at its place of business in St. Louis, Missouri. On August 23, 1951, plaintiff was promoted to the position of upgraded helper, a position the duties and functions of which were other than temporary, and plaintiff continued in such position until his induction into the Armed Forces. On October 23, 1951 plaintiff was inducted into the Armed Forces.

5. Plaintiff was honorably discharged from the Armed Forces on June 2, 1953 and possesses a certificate of satisfactory performance of military service and has otherwise met all the requirements of Section 9 of the Act.

6. Plaintiff, on June 11, 1953, returned to the employment of the defendant and was reinstated as upgraded helper. On December 24, 1957, plaintiff met all the requirements for and was promoted to the position of carman. Defendant established the date of plaintiff's seniority in the position of carman as December 25, 1957. Plaintiff states that this is in violation of the reemployment rights under Section 9(c)(1) of the Act, which entitled him to have his seniority established from the date on which he would have qualified for the position of carman, April 20, 1956, had he not been inducted into the Armed Forces.

WHEREFORE, Plaintiff prays judgment against the defendant, requiring the defendant to restore to plaintiff his rightful seniority status, together with any pay or additional sums of money that he might be entitled to, due to the unlawful withholding of his seniority rights, and such other and further relief as the Court may deem just and proper, and for costs.

Second Amended Complaint (Tilton Case)

(Filed in U. S. District Court—December 11, 1959)

Comes now the plaintiff and for his cause of action herein states:

I

1. Jurisdiction of this action is conferred upon the Court by Section 9(d) of the Universal Military Training and Service Act (Act of June 24, 1948, c. 625, Title I Section 9, 62 Stat. 615, as amended, 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Sections 9(b), 9(c)(1) and 9(c)(2) of the Act, relating to seniority rights, seeking relief on a primary basis and, if that fails, an alternative basis.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court, but at certain past times, the business of said defendant was conducted by a trustee; and "defendant" as used herein includes such trustee where factually warranted.

4. Plaintiff was first employed by defendant in July, 1949, as a carman helper at its place of business in Kansas City, Missouri, and continued in its active employment in that and other positions, each of which was a "position other than a temporary position" under the Act, until he left such position for the armed forces on October 16, 1950.

5. At all relevant times there existed for employees within the carman craft a series of written labor agreements, with amendments and supplements thereto, between defendant and System Federation No. 2 of Railway Employees' Department A. F. of L., hereafter called "the union." These agreements operated at the times therein indicated, to define the contract rights of employees of the carman craft.

II

6. A basic written agreement effective July 1, 1936, operative at all relevant times, defined seniority areas, made

the seniority of carman (mechanics) separate from carman helpers, and dated seniority of all employees "from the time pay starts when employed or reemployed." Ranking on a seniority roster reflected the seniority date, and "employed" meant "employed as carman" or "employed as carman helper", etc.. (Rules 25(a), (c) and (e) of 1936 contract.)

7. Defendant and the union made a collateral agreement effective July 1, 1943 under which, because of a shortage of "qualified carmen" (here meaning persons with carman mechanic seniority in defendant's employ), certain classes of non-mechanics in the carman craft should be advanced to service as carman mechanics, in a fixed order of priority. The agreement provided that, within the class of carman helpers, promotion to "temporary mechanic" (meaning "temporary carman," also called "upgraded helper") should be made "with due regard to their order of seniority, qualifications for advancement, etc. . . . All selections being made jointly by the Shop Superintendent or Master Mechanic and Employes' Local Committee." Under the contract, helpers advanced to mechanic (carman) would not at once acquire seniority as under Rule 25(e) of the 1936 agreement, but, on accumulating three years service as a mechanic, had the right to acquire seniority as mechanic as of the latter date, or, in their option, revert to helper. (Agreement of June 18, 1942, effective July 1, 1942 except par. 4 and pars. 9 to 11, and all after par. 12). This agreement was effective until superseded by an agreement of December 7, 1953.

8. On April 1, 1950, plaintiff was promoted from carman helper to "temporary carman" by the selection process of the 1942 agreement and continued in that position until October 23, 1951, when he left for the Armed Forces, being inducted on October 27, 1951, and during that time he performed carman (mechanic) work at carman pay as provided in the 1942 agreement but held only carman helper seniority.

Plaintiff's primary claim for relief is based on the 1936 and 1942 agreements, under which he would automatically

and by right, free of employer discretion, have acquired carman seniority on and with a date of April 1, 1953, if he had not served in the Armed Forces.

9. The 1942 contract had this effect: (a) the only discretion provided for the employer, permitted, or, in practice, exercised, was that used in the original selection of a carman helper for promotion to temporary carman mechanic; (b) a carman helper so promoted is fully qualified for carman work; (c) practice under the contract showed that temporary carmen who were upgraded helpers acquired carman seniority exactly three years after their selection and upgrading; (d) three years "service as a mechanic" meant three calendar years after promotion to "temporary carman"; (e) in practice neither the amount nor quality of experience in carman work affected the right of a temporary carman to carman seniority on the third anniversary of his promotion, though he could elect to revert to carman helper; (f) withholding carman seniority on promotion to temporary carman was intended to protect the seniority of employees who had become carmen before July 1, 1942, and who were in military service; (g) the employer neither had, nor attempted to exercise, discretion as to granting upgraded helpers carman seniority on the third anniversary of upgrading, or as to deferring their seniority or altering the date. Plaintiff, who became a "temporary carman" before military service, had a right under the Act, on reinstatement or thereafter, depending on the timing of the third anniversary of his promotion, to have that third anniversary as his carman seniority date, if he continued as a carman.

10. Plaintiff was discharged from the armed forces on December 21, 1951, with a certificate of satisfactory service, applied for statutory rights and otherwise met all the requirements of Section 9 of the Act.

11. On January 2, 1952, plaintiff was returned to the active employment of defendant in the position of "temporary carman" with his original carman helper date.

12. From January 2, 1952, until April 1, 1953, plaintiff remained a temporary carman, and as of April 1, 1953,

had retained that position for three years after his promotion, apart from his military absence.

13. Plaintiff voluntarily continued as carman on and after April 1, 1953, and therefore became automatically and at once entitled to a carman seniority date of April 1, 1953, and lost his carman helper seniority under the 1942 agreement. Defendant has at all times failed to treat plaintiff's military absence as time in employment as temporary carman, or as part of the three years after upgrading for which carman seniority was deferred by the 1942 contract, has refused to recognize plaintiff's seniority date as April 1, 1953, and wrongfully withheld all carman seniority from plaintiff until August 28, 1956, when defendant assigned plaintiff a carman seniority date of August 28, 1956, with resulting inferior ranking on the seniority list.

III

If plaintiff's primary claim should not prevail, plaintiff makes this alternative claim, based on the above and the following:

14. On December 7, 1953, defendant and the union made an agreement, effective generally as of July 1, 1953, superseding the 1942 agreement. The 1953 contract provided for future advancement of non-mechanics to temporary carman; for the listing of all present and future temporary carmen by date of upgrading, which date controlled priority for carman work, and for retention in grade in case of reduction in force. Under the contract, a helper advanced to carman retains helper seniority, but works and is paid as a carman. On completion of 1040 days work as carman "he shall be considered as a qualified carman" and "will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper . . ." "Qualified carman" as last used meant an employee who had performed 1040 days of carman's work, who then had an unconditional right to seniority as carman. Under this agree-

ment, defendant neither had, nor in practice exercised, any discretion, except in upgrading carman helpers to temporary carman; but an upgraded helper who completed 1040 days at carman work, having been notified of that fact by the employer as practice required, had an automatic right to carman status and seniority if he chose them.

15. Between his promotion on April 1, 1950, and the date when the upgrading list was set up under the 1953 agreement, plaintiff had an automatic right to work as carman on every day that carman work was available to any upgraded helper who had no more helper seniority than he. Plaintiff worked as carman on substantially every day when carman work was available to him under said rule, except between October 16, 1950, and January 2, 1952, during his military absence, during which time he would, if present, have had the same right and would so have exercised it.

16. After the upgrading list was established, plaintiff had under the 1953 agreement an automatic priority for carman work based on the order of his upgrading to temporary carman and worked as carman on every day on which, under defendant's interpretation of the contract and the Act, he was entitled to said work.

17. On August 28, 1956, plaintiff completed 1040 days of carman work and, on being notified thereof, immediately elected carman's seniority and surrendered his helper seniority; thereupon defendant assigned to plaintiff a carman seniority date of August 28, 1956, and the resulting ranking.

18. If plaintiff had not performed military service, he would have completed 1040 days of carman work in a shorter time than that elapsing between January 2, 1952, and August 28, 1956, because during part of the latter period less carman work was needed, more carmen being available because they were not in the armed forces; and further because during the latter period employees who had been junior to plaintiff as carman helper and who had been upgraded after him, having acquired carman seniority before he could do so and before they otherwise would have because of plaintiff's military service, were allowed priority for carman work by defendant because of their carman

seniority, none of which could have affected plaintiff had he not been in military service.

19. Plaintiff would have chosen carman seniority and relinquished his seniority as helper at any time and under any condition through which he could have acquired carman seniority.

20. Seniority as carman represents ranking on the carman seniority list to which a precise date is not always a necessity, but plaintiff avers that, except for military service, he would have completed 1040 days of carman work before August 28, 1956, and before the date when the first carman helper upgraded after him or junior to him completed 1040 days work. Plaintiff further avers that he would have elected carman seniority and on so electing would have had an automatic right to a seniority date and ranking as above described, as required by the Act.

21. Defendant has refused any adjustment of plaintiff's carman seniority, and has thereby penalized him by at least one day in seniority date for each day when he would have worked as carman during his military absence, with resulting loss of seniority ranking; this has caused, and will cause, loss of earnings to plaintiff as a consequence, in violation of Sections 9(b), 9(c)(1) and 9(c)(2) of the Act.

IV

Wherefore plaintiff prays judgment against the defendant, requiring defendant to accord plaintiff the seniority date of April 1, 1953, as carman with the appropriate ranking, or in the alternative to restore to plaintiff his rightful seniority date and ranking as carman, together with any damages to which he may be entitled due to the unlawful withholding of his seniority rights on and after April 1, 1953, or in any event after August 28, 1956, and such other and further relief as the Court may deem just and proper, and for costs.

Second Amended Complaint (Beck Case)

(Filed in U.S. District Court—December 11, 1959)

Comes now the plaintiff and for his cause of action herein states:

I

1. Jurisdiction of this action is conferred upon the Court by Section 9 (d) of the Universal Military Training and Service Act, (Act of June 24, 1945, c. 625, Title I Section 9, 62 Stat. 615, as amended; 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Sections 9 (b), 9 (c) (1) and 9 (c) (2) of the Act, relating to seniority rights.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court, but at certain past times, the business of said defendant generally was conducted by a trustee; and "defendant" as used herein includes such trustee where factually warranted.

4. Plaintiff was first employed by defendant on May 12, 1950, as a carman helper at its place of business in Alexandria, Louisiana, and continued in defendant's active employment in that and other positions, each of which was a "position other than a temporary position" under the Act, until his induction into the armed forces on March 5, 1955.

5. At all relevant times there existed for employees within the carman craft a series of written labor agreements, with amendments and supplements thereto, between defendant and System Federation No. 2 of Railway Employees' Department, A. F. of L., hereinafter called "the union." These agreements operated at the times therein indicated, to define the contract rights of employees of the carman craft.

II

6. A basic written agreement effective July 1, 1936, operative at all relevant times, defined seniority areas, made

the seniority of carman (mechanics) separate from carman helpers, and dated seniority of all employees "from the time pay starts when employed or reemployed." Ranking on a seniority roster reflected the seniority date, and "employed" meant "employed as carman" or "employed as carman helper". (Rules 25 (a), (c) and (e) of 1936 contract.)

7. Defendant and the union made a collateral agreement effective July 1, 1942, under which, because of a shortage of "qualified carmen" (here meaning persons with carman mechanic seniority in defendant's employ), certain classes of non-mechanics in the carman craft should be advanced to service as carmen mechanics, in a fixed order of priority. The agreement provided that, within the class of carman helpers, promotion to "temporary mechanic" (meaning "temporary carman," also called "upgraded helper") should be made "with due regard to their order of seniority, qualifications for advancement, etc. . . . All selections being made jointly by the Shop Superintendent or Master Mechanic and Employes' Local Committee." The agreement also provided that helpers who became "temporary carmen" could acquire seniority as carmen mechanics after such promotion, but not at once as provided by the 1936 agreement; but that on being selected as above, they should perform carman work and receive carman pay. The 1942 agreement was superseded by an agreement of December 7, 1953.

8. On October 12, 1951, plaintiff was promoted to "temporary carman" by the process provided for on July 1, 1942, described above, and continued in that position until March 3, 1955, (when he left for military service), performing carman work at carman pay but, because of the intervening agreement of December 7, 1953, not having acquired carman seniority.

9. The contract of July 1, 1942, had this effect: (a) the only discretion provided for the employer, permitted, or, in practice, exercised, was that used in the original selection of a carman helper for upgrading to temporary carman; (b) a carman helper so promoted is fully qualified

for carman work; (c) seniority as carman is withheld until the third anniversary of initial upgrading, at which time the temporary carman may elect carman seniority or revert to carman helper, with the helper seniority he has retained; (d) withholding of carman seniority on upgrading to temporary carman, and use of the term "temporary carman," were designed to protect carmen who had acquired seniority before July 1, 1942, and who were in the armed forces; (e) the position of temporary carmen on the carman helper roster controlled their right to do carman work, with no right of discretion in the employer; for carman work, temporary carmen received carman pay.

10. The superseding agreement of December 7, 1953, effective in part on August 1, 1953, provided for advancement of employees to temporary carmen in the future; it further provided for listing all present and future temporary carmen by date of upgrading from helper to temporary carman, and made date of upgrading the controlling factor for priority of entitlement to do carman work, and for retention in grade in case of reduction in force. A helper so advanced to temporary carman retains seniority as helper, but, on completion of 1040 days of service as carman, "he shall be considered as a qualified carman," and "will make his choice in writing to acquire a seniority date, as carman, as of the ending date of the 1040 days of service as such, and relinquish his seniority as helper. If he fails to do so he will return to status of helper. . . ." "Qualified carman," as therein used, meant an employee with an unconditional right to seniority as carman in defendant's employment. Under the 1953 agreement, the defendant neither had, nor in practice exercised, any discretion or judgment, except in the upgrading of carman helper to temporary carman; a temporary carman who had completed 1040 days at carman work had an automatic right to choose carman status and seniority. The employer had no right, discretionary or otherwise, to postpone or reduce the carman seniority of an upgraded helper who had, through 1040 days of carman work, earned and elected seniority as a carman, or to deny

him status as carman achieved through such work and election.

11. Between his upgrading to temporary carman on October 12, 1951 and December 7, 1953, (or the later date when the upgrading list was set up by the employer pursuant to the agreement of December 7, 1953), plaintiff had an automatic right to work as carman on every day that carman work was available to temporary carmen who had been helpers and who had no greater helper seniority than he; and from the time when the upgrading list was set up after the agreement of December 7, 1953, until March 3, 1955, when he was inducted into the armed forces, plaintiff had an automatic right to work, as temporary carman, on every day when carman work was available under said rules to any carman helper upgraded after him; and between October 12, 1951, and his induction on March 3, 1955, plaintiff so worked on substantially every day when carman work was available under said rules and performed more than 800 days of such work.

12. Plaintiff was honorably discharged from military service on March 1, 1957. He applied for statutory rights, and otherwise met all the requirements of Section 9 of the Act, and on March 9, 1957, returned to the active employment of defendant, and was reinstated as a temporary carman.

13. Between March 9, 1957, and December 5, 1957, the plaintiff had an automatic right to carman's work, consistent with his date of upgrading under the 1953 agreement, and worked as carman on every day on which, under defendant's interpretation of the contract and of the Act, he was entitled thereto.

14. On December 5, 1957, plaintiff actually completed 1040 days of carman's work, performed by him as temporary carman, and, on being informed thereof by the employer, as was the established practice and his right, immediately elected carman seniority and surrendered his helper seniority; thereupon the defendant assigned to plaintiff a carman seniority date of December 5, 1957, and the ranking resulting therefrom.

15. Had Plaintiff not performed military service, he would, between March 3, 1955 and March 9, 1957, have performed carman work on substantially every day when he had a right thereto, based on his date of upgrading to temporary carman, until he had completed 1040 days of carman work; and he would have completed 1040 days work before the date of his return from military service, and long before December 5, 1957.

16. If plaintiff had not been in military service, he would have completed the days needed, from and after his induction, to total 1040 in a shorter calendar time than that elapsing between March 9, 1957 and December 5, 1957, because during the latter period, employees junior to him as carman helper, and who were upgraded to temporary carman after him, had, because of his military absence, acquired carman seniority before he could; the defendant allowed these employees priority for carman work over plaintiff because they held such carman seniority, which could not have happened had he not been in military service.

17. Plaintiff would have chosen carman seniority, and relinquished his seniority as helper, at any time and under any condition through which he could have acquired carman seniority.

18. Seniority as carman represents ranking on the carman seniority list, to which a precise seniority date is not always a necessity, but plaintiff avers that, but for his military service, he would have completed 1040 days of carman work before December 5, 1957, and before the date when the first carman helper upgraded after him or junior to him completed 1040 days' work. Plaintiff further avers that he would have then elected carman seniority, and that, on his so electing carman seniority on December 5, 1957, his seniority date as carman, and his ranking, should have been established accordingly, as required by the Act.

19. Defendant has refused any adjustment of plaintiff's carman seniority, and has thereby penalized him by at least one day in seniority date for each day when he would have worked as carman during his military absence, with resulting loss of seniority ranking; this has caused, and

will cause, loss of earnings to plaintiff as a consequence, in violation of Sections 9(b), 9(c)(1) and 9(c)(2) of the Act.

III

Wherefore plaintiff prays judgment against the defendant, requiring defendant to restore to plaintiff his rightful seniority date and ranking as carman, together with any damages to which he may be entitled due to the unlawful withholding of his seniority rights on and after December 5, 1957, and such other and further relief as the Court may deem just and proper, and for costs.

SECOND AMENDED COMPLAINT (McCLEARN CASE)

(Filed in U.S. District Court—December 11, 1959)

Comes now the plaintiff and for his cause of action herein states:

I

1. Jurisdiction of this action is conferred upon the Court by Section 9(d) of the Universal Military Training and Service Act, (Act of June 24, 1948, c. 625, Title I, Section 9, 62 Stat. 614, as amended; 50 U.S.C. App. Section 459), hereinafter called the Act.

2. Plaintiff brings this action to require defendant to comply with the provisions of Section 9(b), 9(c)(1) and 9(c)(2) of the Act, relating to seniority rights.

3. Defendant is, and at all times hereinafter mentioned was, a corporation maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court, but at certain past times, its business was conducted by a trustee; and "defendant" as used herein includes such trustee where factually warranted.

4. Plaintiff was first employed by defendant on May 24, 1950 as a carman helper at its place of business in St.

Louis, Missouri, and continued in defendant's active employment in that and other positions, each of which was a "position other than a temporary position" under the Act, until he left for the armed forces on October 23, 1951.

5. At all relevant times there existed for employees within the carman craft a series of written labor agreements, with amendments and supplements thereto, between defendant and System Federation No. 2 of Railway Employees' Department, A. F. of L., hereinafter called "the union." These agreements operated at the times therein indicated, to define the contract rights of employees of the carman craft.

II

6. A basic written agreement effective July 1, 1936, operative at all relevant times, defined seniority areas, made the seniority of carman (mechanics) separate from carman helpers, and dated seniority of all employees "from the time pay starts when employed or reemployed." Ranking on a seniority roster reflected the seniority date, and "employed" meant "employed as carman" or "employed as carman helper." (Rules 25(a), (c) and (e) of 1936 contract).

7. Defendant and the union made a collateral agreement effective July 1, 1942 under which, because of a shortage of "qualified carmen," (here meaning persons with carman mechanic seniority in defendant's employ), certain classes of non-mechanics in the carman craft should be advanced to service as carman mechanic, in a fixed order of priority. The agreement provided that, within the class of carman helpers, promotion to "temporary mechanic" (meaning "temporary carman", also called "upgraded helper") should be made "with due regard to their order of seniority, qualifications for advancement, etc. . . . All selections being made jointly by the Shop Superintendent or Master Mechanic and Employes' Local Committee." The agreement also provided that helpers who became temporary carmen could acquire seniority as carmen mechanics after such promotion, but not at once as provided by the 1936 agreements; on being selected as above, they

should perform carman work and receive carman pay. The 1942 agreement was superseded by an agreement of December 7, 1953.

8. On August 23, 1951, plaintiff was promoted to "temporary carman" by the process provided for on July 1, 1942 and described above, and continued in that position until October 23, 1951, when he left for induction into the armed forces, being inducted on October 27, 1951. From August 23, 1951 until October 23, 1951, plaintiff was performing, as a temporary carman, carman work at carman pay, but was holding only carman helper seniority.

9. The contract of July 1, 1942 had this effect: (a) the only discretion provided for the employer, permitted, or, in practice, exercised, was that used in the original selection of a carman helper for upgrading to temporary carman; (b) a carman helper so promoted is fully qualified for carman work; (c) seniority as carman is withheld until the third anniversary of initial upgrading, at which time the temporary carman may elect carman seniority or revert to carman helper, with the helper seniority he has retained; (d) the withholding of carman seniority on upgrading to temporary carman, and use of the term "temporary carman," were designed to protect carmen who had acquired seniority before July 1, 1942, and who were in the armed forces; (e) the position of temporary carmen on the carman helper seniority roster controlled their right to do carman work, with no right of discretion in the employer; for carman work, temporary carmen received carman pay.

10. Before plaintiff could acquire carman seniority under the 1942 agreement, the superseding agreement of December 7, 1953 was adopted, effective in part on August 1, 1953. It provided for advancement of employees to temporary carman in future, for listing all present and future temporary carmen by date of upgrading from helper to temporary carman, and made such date of upgrading the controlling factor for priority of entitlement to do carman work, and for retention in grade in case of reduction in force. A helper so advanced to temporary carman re-

tains helper seniority, but, on completion of 1040 days of service as carman, "he shall be considered as a qualified carman," and "will make his choice in writing to acquire a seniority date, as carman, as of the ending date of the 1040 days of service as such, and relinquish his seniority as helper. If he fails to do so he will return to status of helper . . ." "Qualified carman" as therein used, meant an employee with an unconditional right to seniority as carman in defendant's employment. Under the 1953 agreement, the defendant neither had, nor in practice exercised, any discretion or judgment, except in the upgrading of carman helper to temporary carman; a temporary carman who had completed 1040 days at carman work had an automatic right to choose carman status and seniority. The employer had no right, discretionary or otherwise, to postpone or reduce the carman seniority of an upgraded helper who had, through 1040 days of carman work, earned and elected seniority as a carman, or to deny him status as carman achieved through such work and election.

11. Between his upgrading to temporary carman on August 23, 1951, and his induction on October 23, 1951, plaintiff, as a temporary carman, had an automatic right to work as carman on every day that carman work was available to temporary carmen who had been helpers and who had no greater helper seniority than he; he so worked on substantially every day when carman work was available under said rules.

12. Plaintiff was honorably discharged from military service on June 2, 1953. He applied for statutory rights, otherwise met all the requirements of Section 9 of the Act, and on June 11, 1953, returned to the active employment of defendant, and was reinstated as a temporary carman.

13. Plaintiff avers that if he had not been in military service, he would have had, between October 23, 1951 and June 11, 1953, the same priority for carman work as is described in paragraph 11 hereof, and would have worked on substantially every day when carman work would have been available to him under the 1942 rules.

14. Between June 11, 1953 and the date after December

7, 1953 when the upgrading list was established pursuant to the December 7, 1953 agreement, plaintiff had the same priority for carman work as is described in paragraph 11 hereof, and worked as a carman on substantially every day when carman work was available to him under defendant's interpretation of the 1942 rules and the Act.

15. After the establishment of the upgrading list, up to and including December 25, 1957, plaintiff had an automatic right to carman's work, consistent with his date of upgrading under the agreement of December 7, 1953, and worked as carman on every day on which under defendant's interpretation of the contract and the Act, he was entitled to said work.

16. On December 24, 1957, plaintiff actually completed 1040 days of carman's work, performed by him as a temporary carman, and, on being informed thereof by the employer, as was the establishment practice and his right, immediately elected carman seniority and surrendered his helper seniority; thereupon defendant assigned to plaintiff a carman seniority date of December 25, 1957, and the ranking resulting therefrom.

17. If plaintiff had not been in military service, he would have completed 1040 days of carman work in a shorter calendar time than that elapsing between June 11, 1953 and December 25, 1957 for the following reasons: During that period less carman work was needed, more carmen being available because they were not in military service. Also during that period, employees junior to plaintiff as carman helpers and who were upgraded after him, had, because of his military absence, acquired carman seniority before plaintiff could have, and before such junior employees would have but for plaintiff's absence; the defendant allowed them priority for carman work over plaintiff because they held carman seniority, none of which could have affected plaintiff had he not been in military service.

18. Plaintiff would have chosen carman seniority, and relinquished his seniority as helper, at any time and under any condition through which he could have acquired carman seniority.

19. Seniority as carman represents ranking on the carman seniority list, to which a precise seniority date is not always a necessity, but plaintiff avers that, but for his military service, he would have completed 1040 days of carman work before December 24, 1957, and before the date when the first carman helper upgraded after him or junior to him completed 1040 days' work. Plaintiff further avers that he would then have elected carman seniority, and that, on his so electing carman seniority on December 24, 1957, his seniority date as carman, and his ranking, should have been established accordingly, as required by the Act.

20. Defendant has refused any adjustment of plaintiff's carman seniority, and has thereby penalized him by at least one day in seniority date for each day when he would have worked as carman during his military absence, with resulting loss of seniority ranking; this has caused, and will cause, loss of earnings to plaintiff as a consequence, in violation of Sections 9(b), 9(c)(1) and 9(c)(2) of the Act.

III

WHEREFORE, plaintiff prays judgment against the defendant, requiring defendant to restore to plaintiff his rightful seniority date and ranking as carman, together with any damages to which he may be entitled due to the unlawful withholding of his seniority rights on and after December 25, 1957, and such other and further relief as the Court may deem just and proper, and for costs.

ANSWER TO SECOND AMENDED COMPLAINT AND COUNTERCLAIM AND CROSS CLAIM IN INTERPLEADER (TILTON CASE)

(Filed in U.S. District Court December 24, 1959)

I. First Defense

The plaintiff's second amended complaint, as well as his original complaint and his amended complaint, fails to state

a claim or cause of action against defendant upon which plaintiff is entitled to relief.

II. Second Defense

In answer to the second amended complaint and with reference to each paragraph thereof, defendant states:

1. Defendant admits the allegations in paragraph 1.

2. Defendant admits the allegations in paragraph 2, but denies that it has violated Sections 9(b), 9(c)(1) and 9(c)(2) of the Act, or any of them, in respect to plaintiff's seniority rights.

3. Defendant admits the allegations of paragraph 3, and, for clarification, states that defendant's properties were in the possession of and operated by Guy A. Thompson, Trustee, pursuant to Section 77 of the Bankruptcy Act, until March 1, 1956, when the properties and their operation were returned to defendant.

4. Defendant admits that plaintiff was first employed by defendant in July, 1949, specifically July 13, 1949, as a carman helper at its place of business in Kansas City, Missouri. Defendant also admits that plaintiff continued in its active employment in that position and as a "temporary carman" until he left for the Armed Forces in October, 1950, and admits that each such position was "a position other than a temporary position" under the Act. Defendant denies that plaintiff held any other position than as described herein and denies all other allegations of paragraph 4.

5. Defendant admits the allegations of paragraph 5.

6. Defendant denies that the basic written agreement effective July 1, 1936, was operative after September 1, 1949, but admits the other allegations of paragraph 6.

7. Defendant admits that defendant and the Union made a collateral agreement on June 18, 1942, effective July 1, 1942, under which certain classes of "non-mechanics" in the carman craft could be temporarily advanced to service as mechanics (carmen), when qualified mechanics were not available, and further admits that this agreement was effective until superseded on August 1, 1953, by an agree-

ment dated December 7, 1953. Defendant denies all other allegations of paragraph 7.

8. Defendant admits that in April, 1950, plaintiff was advanced from carman helper to "temporary carman" pursuant to the 1942 agreement, and continued in that position until October, 1950, when he left for the Armed Forces. Defendant admits that during that time, he performed such work of a carman (mechanic) as he was capable of, and at carman pay, but held only a carman helper seniority, all as provided in the 1942 agreement. Defendant denies all other allegations of paragraph 8.

9. Defendant denies all allegations of paragraph 9.

10. Defendant is without knowledge as to the truth of the allegations in paragraph 10, and, therefore, denies the same.

11. Defendant admits the allegations of paragraph 11.

12. Defendant admits that from January 2, 1952, until April 1, 1953, plaintiff worked as a temporary carman, but defendant denies the balance of paragraph 12.

13. Defendant admits that it has refused to recognize plaintiff's seniority date as April 1, 1953, and that plaintiff has been assigned a carman seniority date of August 28, 1956. All other allegations of paragraph 13 are denied.

14. Defendant admits that on December 7, 1953, defendant and the Union made an agreement which superseded the 1942 agreement; that the 1953 agreement provided for advancement of non-mechanics to temporary carmen, under certain conditions, and for the listing of present and future temporary carmen by date of upgrading; that under the said contract, a helper so advanced to temporary carman retains his helper seniority, but works and is paid as a carman; that on completion of 1,040 days work as carman, "he shall be considered as a qualified carman" and "will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1,040 days of service as such and relinquish his seniority as helper. If he fails to do so, he will return to status of helper." Defendant denies all other allegations in paragraph 14.

15. Defendant admits that between the date when plaintiff was advanced to temporary carman in April, 1950, and

the date when he left for military service in October, 1950, plaintiff had a right to work as carman on every day that carman work was available to any helper advanced after plaintiff was advanced, if such helper was on the same seniority roster. Defendant further admits that plaintiff worked as carman on substantially every day when carman work was available to him under the aforesaid rule, until he left for military service in October, 1950, and that if not absent in military service, he would have had the same right and would probably have exercised it. Defendant denies all other allegations in paragraph 15.

16. Defendant admits that under the 1953 agreement, plaintiff's priority for carman's work, as between him and other temporary carmen on the upgrading list, depended on the order of upgrading. Defendant denies all other allegations of paragraph 16.

17. Defendant admits the allegations in paragraph 17.

18. Defendant admits that if plaintiff had not performed military service, he would probably have completed his 1,040 days of carman work before August 28, 1956, but defendant is without knowledge as to the truth of the other allegations in paragraph 18, and, therefore, denies same.

19. Defendant is without knowledge as to the truth of the allegations of paragraph 19, and, therefore denies same.

20. Defendant admits that if plaintiff had not been on leave of absence and in military service, he could and probably would have completed 1,040 days of carman's work before August 28, 1956, and that he could and probably would have elected carman's seniority upon completion of his 1,040 days, but defendant denies that plaintiff had any right to elect such seniority at any time before actual completion of 1,040 days of work as a carman, and denies all other allegations of paragraph 20.

21. Defendant admits that it has refused to grant any retroactive seniority date or to make any other adjustment in plaintiff's seniority because of his military service, but defendant denies all other allegations in paragraph 21.

Answer to Second Amended Complaint and Counterclaim and Cross-Claim in Interpleader (Beck Case)

(Filed in U. S. District Court—December 24, 1959)

I. First Defense

The plaintiff's second amended complaint, as well as his original complaint and his amended complaint, fails to state a claim or cause of action against defendant upon which plaintiff is entitled to relief.

II. Second Defense

In answer to the second amended complaint and with reference to each paragraph thereof, defendant states:

1. Defendant admits the allegations in paragraph 1.

2. Defendant admits the allegations in paragraph 2, but denies that it has violated Sections 9(b), 9(c)(1) and 9(c)(2) of the Act, or any of them, in respect to plaintiff's seniority rights.

3. Defendant admits the allegations of paragraph 3, and, for clarification, states that defendant's properties were in the possession of and operated by Guy A. Thompson, Trustee, pursuant to Section 77 of the Bankruptcy Act, until March 1, 1956, when the properties and their operation were returned to defendant.

4. Defendant admits that plaintiff was first employed by defendant on May 12, 1950, as a carman helper at its place of business in Alexandria, Louisiana. Defendant further admits that plaintiff continued in its active employment in that position and as a "temporary carman" until he left for the armed forces on March 1, 1955, and admits that each such position was "a position other than a temporary position" under the Act. Defendant denies that plaintiff held any other position than as described herein and denies all other allegations of paragraph 4.

5. Defendant admits the allegations of paragraph 5.

6. Defendant denies that the basic written agreement effective July 1, 1936 was operative after September 1, 1949, but admits the other allegations of paragraph 6.

7. Defendant admits that defendant and the Union made a collateral agreement on June 18, 1942, effective July 1, 1942, under which certain classes of "non-mechanics" in the carmen craft could be temporarily advanced to service as mechanics (carmen), when qualified mechanics were not available, and further admits that this agreement was effective until superseded on August 1, 1953 by an agreement dated December 7, 1953. Defendant denies all other allegations of paragraph 7.

8. Defendant admits that on October 12, 1951, plaintiff was advanced from carman helper to "temporary carman" pursuant to the 1942 agreement, and continued in that position until March 1, 1955 (when he left for military service), performing, as a temporary carman, such carman's work as he was capable of at carman's pay. Defendant admits that before plaintiff could acquire carman's seniority under the 1942 agreement, the superseding agreement of December 7, 1953 was adopted. Defendant denies all other allegations of paragraph 8.

9. Defendant denies all allegations of paragraph 9.

10. Defendant admits that the 1953 agreement provided for advancement of non-mechanics to temporary carmen, under certain conditions, and for the listing of present and future temporary carmen by date of upgrading; that under the said contract, a helper so advanced to temporary carman retains his helper seniority, but works and is paid as a carman; that on completion of 1,040 days work as carman, "he shall be considered as a qualified carman" and "will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1,040 days of service as such and relinquish his seniority as helper. If he fails to do so, he will return to status of helper." Defendant denies all other allegations in paragraph 10.

11. Defendant admits that between his upgrading to temporary carman on October 12, 1951 and March 1, 1955 when he left for military service, plaintiff had a right to work as a carman on every day that carman's work was available to temporary carman on the same seniority ros-

ter, upgraded after October 12, 1951, and that between October 12, 1951 and March 1, 1955, plaintiff worked as a carman on substantially every day when carman work was available under the aforesaid rule. Defendant denies all other allegations in paragraph 11.

12. Defendant is without knowledge as to the truth of plaintiff's allegations that he was honorably discharged from military service on March 1, 1957, and that he otherwise met all of the requirements of Section 9 of the Act. Defendant admits that on March 11, 1957, he returned to the active employment of defendant and was reinstated as a temporary carman with a Carman helper's seniority.

13. Defendant admits that between March 11, 1957 and December 5, 1957, the plaintiff had a right to do carman's work depending upon his date of upgrading under the 1953 agreement, and that he worked as carman on substantially every day on which his date of upgrading gave him the right to work as a carman. Defendant denies all other allegations of paragraph 13.

14. Defendant admits the allegations of paragraph 14.

15. Defendant admits that if plaintiff had not been in military service between March 3, 1955 and March 9, 1957, he would have probably performed carman work on substantially every day when he had a right to do so based upon his date of upgrading to temporary carman until he had completed 1,040 days of carman work. Defendant also admits that he would probably have completed 1,040 days of carman work before March 9, 1957.

16. Defendant admits that if the plaintiff had not been in military service, he would probably have completed his 1,040 days of carman work before December 5, 1957, but defendant is without knowledge as to the truth of the other allegations in paragraph 16, and, therefore, denies the same.

17. Defendant is without knowledge as to the truth of the allegations in paragraph 17, and, therefore, denies same.

18. Defendant admits that if plaintiff had not been on leave of absence and in military service, he could, and probably would, have completed 1,040 days of carman work before Deeember 5, 1957, and that he could, and probably

would, have elected carman's seniority upon completion of his 1,040 days. Defendant denies all other allegations of paragraph 18.

19. Defendant admits that it has refused to grant any adjustment in the plaintiff's carman seniority because of his military service, but defendant denies all other allegations of paragraph 19.

ANSWER TO SECOND AMENDED COMPLAINT AND COUNTERCLAIM AND CROSS CLAIM IN INTERPLEADER (MCCLEARN CASE)

(Filed in U.S. District Court December 24, 1959)

I. First Defense

The plaintiff's second amended complaint, as well as his original complaint and his amended complaint, fails to state a claim or cause of action against defendant upon which plaintiff is entitled to relief.

II. Second Defense

1. Defendant admits the allegations in paragraph 1.

2. Defendant admits the allegations in paragraph 2, but denies that it has violated Sections 9(b), 9(c)(1) and 9(c)(2) of the Act, or any of them, in respect to plaintiff's seniority rights.

3. Defendant admits the allegations of paragraph 3, and, for clarification, states that defendant's properties were in the possession of and operated by Guy A. Thompson, Trustee, pursuant to Section 77 of the Bankruptcy Act, until March 1, 1956, when the properties and their operation were returned to defendant.

4. Defendant admits that plaintiff was first employed by defendant on May 24, 1950 as a carman helper at its place of business in St. Louis, Missouri. Defendant also admits

that plaintiff continued in its active employment in that position and as a "temporary carman" until he left for the Armed Forces on October 23, 1951, and admits that each such position was "a position other than a temporary position" under the Act. Defendant denies that plaintiff held any other position than as described herein, and denies all other allegations of paragraph 4.

5. Defendant admits the allegations of paragraph 5.

6. Defendant denies that the basic written agreement effective July 1, 1936 was operative after September 1, 1949, but admits the other allegations of paragraph 6.

7. Defendant admits that defendant and the Union made a collateral agreement on June 18, 1942, effective July 1, 1942, under which certain classes of "non-mechanics" in the carmen craft could be temporarily advanced to service as mechanics (carmen), when qualified mechanics were not available, and further admits that this agreement was effective until superseded on August 1, 1953 by an agreement dated December 7, 1953. Defendant denies all other allegations of paragraph 7.

8. Defendant admits that on August 23, 1951, plaintiff was advanced from carman helper to "temporary carman" pursuant to the 1942 agreement, and continued in that position until October 23, 1951, when he left for the Armed Forces. Defendant further admits that from August 23, 1951 until October 23, 1951, plaintiff performed, as a temporary carman, such work of a carman as he was capable of, and at carman pay, but he held only a carman helper seniority, all as provided in the 1942 agreement. Defendant denies all other allegations of paragraph 8.

9. Defendant denies all allegations of paragraph 9.

10. Defendant admits that before plaintiff could acquire carman's seniority under the 1942 agreement, the superseding agreement of December 7, 1953 was adopted effective on August 1, 1953. Defendant further admits that the 1953 agreement provided for advancement of non-mechanics to temporary carmen, under certain conditions, and for the listing of present and future temporary carmen by date of upgrading; that under the said contract, a helper so

advanced to temporary carman retains his helper seniority; but works and is paid as a carman; that on completion of 1,040 days work as carman, "he shall be considered as a qualified carman" and "will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1,040 days of service as such and relinquish his seniority as helper. If he fails to do so, he will return to status of helper." Defendant denies all other allegations in paragraph 10.

11. Defendant admits that between his upgrading to temporary carman on August 23, 1951 and October 23, 1951 when he left for military service, plaintiff had a right to work as a carman on every day that carman work was available to temporary carmen, on the same seniority roster, upgraded after August 23, 1951, and that plaintiff worked as a carman on substantially every day when carman work was available to him under the aforesaid rule until he left for military service. Defendant denies all other allegations in paragraph 11.

12. Defendant is without knowledge as to the truth of the plaintiff's allegation that he was honorably discharged from military service on June 2, 1953, and that he otherwise met all of the requirements of Section 9 of the Act. Defendant admits that on June 11, 1953, plaintiff returned to the active employment of defendant, and was reinstated as a temporary carman with a carman helper's seniority.

13. Defendant admits that if plaintiff had not been in military service between October 23, 1951 and June 11, 1953, he would have had the same priority for carman work as admitted in the answer to paragraph 11, and that he would probably have worked on substantially every day when carman work would have been available to him under the provisions of the 1942 agreement. Defendant denies all other allegations in paragraph 13.

14. Defendant admits that between June 11, 1953 and the date when the upgrading list was established pursuant to the December 7, 1953 agreement, plaintiff had the same priority for carman work as is admitted in paragraph 11 hereof, and that he worked as a carman on substantially

every day when carman work was available to him. Defendant denies all other allegations in paragraph 14.

15. Defendant admits that under the terms of the December 7, 1953 agreement, plaintiff's right to do carman's work, as between him and other temporary carmen, depended upon the date of upgrading as established by the upgrading list. Defendant admits that plaintiff worked as a carman on substantially every day on which his date of upgrading gave him the right to work as a carman. Defendant denies all other allegations of paragraph 15.

16. Defendant admits the allegations in paragraph 16.

17. Defendant admits that if plaintiff had not been in military service, he would probably have completed his 1,040 days of carman work before December 25, 1957, but defendant is without knowledge as to the truth of the other allegations in paragraph 17, and, therefore, denies the same.

18. Defendant is without knowledge as to the truth of the allegations in paragraph 19, and, therefore, denies same.

19. Defendant admits that if plaintiff had not been on leave of absence and in military service, he could, and probably would, have completed 1,040 days of carman work before December 24, 1957, and that he could, and probably would, have elected carman's seniority upon completion of his 1,040 days, but defendant denies that plaintiff had any right to elect such seniority at any time before completion of 1,040 days of actual work as a carman, and denies all other allegations of paragraph 19.

20. Defendant admits that it has refused to grant any adjustment of plaintiff's carman's seniority because of his military service, but defendant denies all other allegations in paragraph 20.

Stipulation

(Filed in U.S. District Court May 12, 1960)

The parties hereto hereby agree that the following stipulation of facts may be considered by the Court as evidence in these cases. The parties hereto specifically reserve the right to introduce and offer such additional oral or written evidence as they may deem necessary.

1. Plaintiff herein at all relevant times have been, and are, employees of the defendant within the craft or class known as carman, and, as such, have been, and are, represented by the Brotherhood Railway Carmen of America, the duly designated collective bargaining representative of such employees as provided by the Railway Labor Act, (45 U. S. C. A. 151 to 164). Said Brotherhood is hereafter referred to as the "Union."

2. At all relevant times, there have existed for employees within the carman craft a series of written labor agreements and amendments thereto, negotiated by the Union for and on behalf of such employees on the defendant railroad, which agreements, hereafter identified, have been executed by the Union for the employees and by carrier's bargaining representatives for the defendant.

3. A basic written agreement executed by the defendant and the Union became effective July 1, 1936, and remained in effect thereafter until September 1, 1949. A copy of the said basic agreement is attached hereto, marked Exhibit A.

4. A collateral agreement, sometimes referred to as Decision No. SC-88-1, was executed by the defendant and the Union on June 18, 1942, effective July 1, 1942, copy of which is attached hereto, marked Exhibit J. Said agreement was supplemented on February 1, 1943 by additions to Section 2 and 9, which supplement is included in Exhibit B. This agreement or supplement remained in effect until superseded on August 1, 1953 by the agreement referred to in paragraph 6.

5. The basic written agreement of July 1, 1936, identified as Exhibit A, was superseded by another basic agreement, effective September 1, 1949. A copy of the September 1,

1949 agreement, which is currently in effect, is attached hereto, marked Exhibit C.

6. A collateral agreement was executed on December 7, 1953, effective as of August 1, 1953, which agreement superseded the previous collateral agreement referred to in paragraph 4. A copy of the 1953 collateral agreement, entitled Memorandum Agreement, is attached hereto, marked Exhibit D. This agreement is currently in effect.

7. The agreement referred to in paragraph 6 was supplemented by agreement executed on November 15, 1956, which supplement is attached hereto, marked Exhibit E.

8. Plaintiff Donald I. Tilton was first employed by the defendant as a carman helper at its yards in Kansas City, Missouri, on July 13, 1949.

9. On April 10, 1950, plaintiff Tilton was temporarily advanced or "up-graded" to service as a carman mechanic. Thereafter he performed such carman work as he was capable of for a total of 145 days until, on October 12, 1950, he left his employment to enter military service as a result of a call to active duty from the Reserves.

10. Attached hereto as Exhibit F are true copies of Plaintiff Tilton's work records as maintained by the defendant. These work records show the total number of days Plaintiff Tilton worked as a carman mechanic each month during the period, both prior to and after his military service, that he was employed by defendant as a temporarily advanced carman mechanic.

11. Plaintiff Tilton satisfactorily completed his active military service on December 23, 1951, received a certificate to that effect, and, upon application, was reemployed by defendant on January 2, 1952 as a carman helper, temporarily advanced as a carman mechanic.

12. Pursuant to the collateral agreement of December 7, 1953, identified as Exhibit D, a list of men advanced temporarily to service as carmen mechanics in the yards at Kansas City was compiled, which list is attached hereto, marked Exhibit C.

13. Attached hereto and marked Exhibits H-1 through H-10 are correct copies of the seniority rosters of carmen

helpers and carmen in the defendant's Kansas City yards for the years 1951 to 1960. Commencing with the 1958 roster, pursuant to agreement between defendant and members of the carmen craft represented by the Union, the seniority rosters for all points in the Kansas City Terminal Division were consolidated. These included the Kansas City yards (indicated by the number "6" on the roster) and the diesel facilities (indicated by the number "4" on the roster).

14. As shown on Exhibit F, Tilton completed 1040 days' work as a carman mechanic on August 27, 1956, and upon notification thereof by defendant, immediately surrendered his seniority as a carman helper and elected carman mechanic's seniority, pursuant to the provisions of Exhibit D. Defendant thereupon accorded Tilton a carman mechanic's seniority date of August 28, 1956.

15. Plaintiff Guy L. McClearn was first employed by the defendant as a carman helper on May 24, 1950 at its 21st Street yards in St. Louis, Missouri.

16. On August 23, 1951, Plaintiff McClearn was temporarily advanced or "up-graded" to service as a carman mechanic. Thereafter, he performed such carman work as he was capable of for a total of 21 days, until October 23, 1951 when he left his employment to enter military service.

17. Attached hereto as Exhibit I are true copies of Plaintiff McClearn's work records as maintained by the defendant. These work records show the total number of days Plaintiff McClearn worked as a temporary carman mechanic each month during the period, both prior to and after his military service, that he was employed by defendant as a temporarily advanced carman mechanic.

18. Plaintiff McClearn satisfactorily completed his active military service in June, 1953, received a certificate to that effect, and upon application, was reemployed by defendant on June 11, 1953 as a carman helper temporarily advanced as a carman mechanic.

19. Pursuant to the collateral agreement of December 7, 1953, (Exhibit D) a list of men advanced temporarily to

service as carman mechanic in the 21st Street yards, St. Louis, was compiled, which list is attached, marked Exhibit J.

20. As shown in Exhibit I, McClearn completed 1040 days' work as a temporarily advanced carman mechanic on December 24, 1957, and, upon notification thereof by defendant, immediately surrendered his seniority as a carman helper and elected carman mechanic's seniority. Defendant thereupon accorded McClearn a carman mechanic's seniority date of December 25, 1957, pursuant to the provisions of Exhibit D.

21. Attached hereto and marked Exhibits K-1 to K-10 are correct copies of the seniority rosters of carmen helpers and carmen in the defendant's 21st Street yards in St. Louis for the years 1951 to 1960, inclusive. Prior to 1959, employees in the carman craft had what is known as point seniority, which means that their seniority was limited to the particular yard or shop at which they were working. However, commencing with the 1959 roster, and pursuant to an agreement between the defendant and members of the craft represented by the Union, the seniority rosters for all points in the St. Louis Terminal Division were consolidated. These points were the 21st Street yards, Rankin tract coach yard, Lesparence Street yards, Dupo yard, Ewing Avenue diesel facility, and Carondelet yards.

22. Plaintiff Wilfred I. Beck, Jr., was first employed by the defendant as a carman helper at its yards in Alexandria, Louisiana, on May 12, 1950.

23. On October 12, 1951, Plaintiff Beck was temporarily advanced or "up-graded" to service as a carman mechanic. Thereafter, he performed such carman work as he was capable of for a total of 851 days until on March 1, 1955, he left his employment to enter military service, pursuant to an order to report for induction.

24. Attached hereto as Exhibit L are true copies of Plaintiff Beck's work records as maintained by the defendant. These work records show the total number of days Plaintiff Beck worked as a carman mechanic each month during the period, both prior to and after his mili-

tary service, that he was employed by defendant as a temporarily advanced carman mechanic.

25. Plaintiff Beck satisfactorily completed his active military service in March, 1957, received a certificate to that effect, and upon application, was reemployed by defendant as a carman helper temporarily advanced as a carman mechanic under the provisions of the collateral agreement, dated December 7, 1953, Exhibit D.

26. Pursuant to the collateral agreement of December 7, 1953, identified as Exhibit D, a list of men advanced temporarily to service as carman mechanics in the yards at Alexandria, Louisiana, was compiled, which list is attached hereto, marked Exhibit M.

27. Attached hereto and marked Exhibits N-1 through N-6 are correct copies of the seniority rosters of carmen helpers and carmen in the defendant's yards at Alexandria for the years 1955 through 1960.

28. As shown in Exhibit L, Plaintiff Beck completed 1040 days of work as a carman mechanic on December 5, 1957, and upon notification thereof by defendant, surrendered his seniority as a carman helper on December 13, and elected a carman mechanic's seniority, pursuant to the provisions of Exhibit D. Defendant thereupon accorded Beck a carman mechanic's seniority date of December 5, 1957.

29. Under the provisions of the collateral agreement identified as Exhibit D, persons are selected for upgrading in accordance with Section 1 of that agreement, and are placed on a list of temporarily advanced carmen in the order of their date of upgrading. (Persons upgraded prior to the effective date of this agreement were also placed on such list, according to their original date of upgrading.) Carman mechanic's work is assigned to temporarily advanced carmen in the order of date of upgrading, and is paid for at carman mechanic's rates, although helper seniority is retained and no carman seniority is acquired. Upon the completion of 1040 days' work as a carman, the temporarily advanced carman is required to make his choice, in writing, to acquire a carman mechanic's seniority date as of the completion of the 1040 days and relinquish his

seniority as helper. If he fails to do so, he will return to his status as a carman helper and does not acquire seniority as carman. All three plaintiffs here involved, Tilton, Beck and McClearn, promptly elected mechanic's seniority upon the completion of 1040 days' service as carman.

30. Under the collateral agreements identified above as Exhibits B and D, as between carman helpers temporarily advanced, carman mechanic's work was assigned to such helpers in the order of their date of upgrading or advancement.

31. Plaintiff Tilton did not, on April 10, 1953 (the third anniversary of his temporary advancement to carman), or at any time prior to August 28, 1956 relinquish his seniority rights as a carman helper, nor did he file any protest in writing with respect to his seniority and classification as shown on the seniority rosters posted at Kansas City in January, 1954, January, 1955, or within 30 days after the posting of the January, 1956 roster.

32. Plaintiff Beck did not, on October 12, 1954 (the third anniversary of his temporary advancement to carman), or at any time prior to December 13, 1957 relinquish his seniority rights as a carman helper and elect a carman's seniority.

33. Plaintiff McClearn did not, on August 23, 1954 (the third anniversary of his temporary advancement to carman), or at any time prior to December 25, 1957 relinquish his seniority as a carman helper and elect a carman's seniority.

[It was also stipulated that defendant's answers could be corrected by interlineation to conform to the facts set forth in this stipulation.]

Exhibit D

Memorandum Agreement

The Carrier having made election to make Article III of agreement signed at New York on the fourth day of June, 1953, by the Eastern, Western and Southeastern Carriers' Conference Committees and the General President of the Brotherhood Railway Carmen of America, effective [August 1, 1953—See Stipulation, ¶ 6] as prescribed therein, it is agreed that an understanding should be reached on the manner in which this Article III will be applied. It is also agreed that the upgrading provisions of agreement known as SC-88-1, dated June 18, 1942, are superseded by this agreement.

It Is Therefore Agreed:

Section 1.

When the Carrier is unable to employ qualified carmen, truckmen, apprentices and helpers will be advanced to carmen as prescribed by this agreement.

Advancements will be made in the following order and manner:

(a) Truckmen employed at the point where carmen are needed will be given first opportunity for advancement. Truckmen will, at the time, indicate their option in writing. Truckmen electing to be advanced will, in their written acceptance of advancement, state whether they desire to acquire seniority date as carman as of the date advanced and relinquished seniority as truckman, or if they desire temporary advancement without acquiring carman's seniority and retain seniority as truckman.

(Truckmen who have previously been advanced to carman and who are working as such on the effective date of this agrement will indicate in writing, within 10 days, whether they desire to acquire seniority date as carman as of the effective

date of this agreement and relinquish seniority as truckman, or if they wish to be considered as temporarily advanced without acquiring seniority as carman and retain seniority as truckman.)

(b) When additional carmen are needed, regular apprentices employed at the point where carmen are needed, who have served 520 days or more of actual service of their apprenticeship, will be advanced. Apprentices with the greatest number of days of apprentice training to their credit will be the first advanced.

(c) If there is still need for carmen, helper apprentices employed at the point where carmen are needed will then be advanced. Helper apprentices with the greatest number of days of apprentice training to their credit will be the first advanced.

(d) Should the need for carmen not be met by the advancement of truckmen and apprentices, helpers employed at the point where carmen are needed, who are qualified for advancement, will be so advanced. First choice to be made from helpers with two years or more of service as such. Master Mechanic or Superintendent of Shops and Local Committee will jointly agree on the helpers to be advanced. In the event there is disagreement on one or more helpers, other helpers on which agreement is reached will be advanced so that the immediate need for carmen will be filled and the names of the helpers not agreed on as qualified for advancement will be referred to the General Chairman and Chief Mechanical Officer for prompt determination of the qualifications of the men involved. If it is determined that the helper or helpers in dispute should be advanced, they will take their places on the upgraded list as of the date they would have been advanced had the dispute not arisen. There will be no claims of any nature made by any employe represented by the Brotherhood Railway Carmen of

America by reason of dispute or disputes concerning the individual helpers to be advanced.

(e) If the foregoing does not fill the need for additional carmen, men having mechanical experience will be employed as helpers and may immediately be advanced to carman and will thereafter come under the provisions of this agreement.

Section 2.

A list of all men advanced temporarily as carman will be compiled and maintained. Men will be listed on the same in the order of their upgrading and the date of upgrading will be shown opposite the name of each man thereon. The listing of the dates is not to be considered as a seniority date. When force reductions are made, the demotion from carman shall be in the reverse order of upgrading as shown on the upgraded list, the last men upgraded to be the first men demoted.

Men temporarily advanced to carmen prior to the effective date of this agreement will be included in the upgraded list provided for above and will retain their places on such list in the same manner as men advanced after the effective date of this agreement.

Section 3.

(a) Apprentices and helper apprentices temporarily advanced will receive one day of credit of apprentice training for each day worked as a carman toward completion of apprenticeship.

(b) A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not

again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper.

Section 4.

Apprentices and helpers returning from the armed services, whose seniority has been protected as provided for by the laws of the United States and by agreement between the Organization and the Carrier will be governed by the following:

(a) Apprentices who were upgraded, and whose names were carried on the upgraded list at the time they entered the armed services, will retain that position on the upgraded list.

(b) Apprentices who had not been upgraded at the time they entered the armed services will be given a position on the upgraded list, based on their days of actual service as compared with days of actual service of other upgraded apprentices, as of the date they entered the armed services as provided for under Section 1 (b) and (c) of this agreement.

(c) Helpers upgraded to carmen will retain their position on the list of upgraded men if they enter the armed services.

Section 5.

Upgraded men will be permitted to make application for vacancies to positions as carmen and if there are no bids received from men who hold seniority as carmen, the upgraded men making application will be assigned based on their position on the upgraded list.

Section 6.

In the application of Rule 37 of the agreement between the Carrier and System Federation No. 2, effective Sep-

tember 1, 1949, governing the ratio of apprentices to mechanics, such apprentices and helpers who are temporarily advanced to service as carmen shall not be considered as mechanics in the calculation of the ratio of apprentices to mechanics. Apprentices, either regular or helper, upgraded to serve as mechanics will be considered as apprentices in the application of Rule 37 until such time as they have completed the necessary days of apprenticeship to qualify them as mechanics.

This agreement shall become effective as of August 1, 1953 and shall remain in effect until changed or abrogated in accordance with the provisions of Section 6 of the Railway Labor Act as amended.

EXHIBIT J

The following is list of men upgraded temporarily to carmen at 21st Street:

Name	Date Upgraded
F. Wilson Jr.	4-12-1950
N. W. Cliffe	12- 1-1950
M. Ludwig	4- 5-1951
C. E. McBride	4- 7-1951
G. McClearn	8-23-1951
M. Schaefer	10-10-1951
L. Rodgers	10-31-1951
J. Cotton	1-24-1952
W. Edwards	3-28-1952
M. M. Batey	6-30-1952
T. K. Cummins	7-10-1952
J. Ferrarie	8-27-1952
C. C. Cunningham	9-17-1952
P. Sullivan	11-26-1952
T. W. Isaac	1- 3-1953
H. Wisdom	2- 5-1953
P. Trusick	4-21-1953
W. Becker	4-29-1953

EXHIBIT K (Part)

Section 17, page 1

Seniority Roster of Car Department Employes Under the Jurisdiction of the Master Mechanic at St. Louis as of January 1, 1958

21st Street Car Department

Division 6—Carmen

Name	Soc. Sec. No.	Seniority	Work No.
1. O'Malley, James J.	702-16-3186	10- 1-1922	825
2. Harper, Thomas J.	702-16-3586	12-28-1924	826
3. Fancher, Herbert L. (4-man)	702-16-3655	2- 2-1927	
4. Scott, R. A. (wrecker 4-man)	702-16-3587	7- 2-1929	
5. McKeon, Thos. F. (4-man)	702-16-3519	5-18-1931	
6. Meinhardt, R. C. (4-man)	702-16-3638	12-12-1934	
7. Gibbs, Charley	702-16-3713	1-16-1941	827
8. Cummings, T. A. (Car 4-man)	702-16-3715	1-16-1941	
9. Edwards, Carl B.	702-16-3731	11-27-1941	828
10. Zittel, Jerome (Asst. 4-man)	702-16-3644	2-24-1943	
11. Briley, Carter J.	702-16-3649	3- 2-1943	829
12. McCormack, C. F. (Pacific, Mo.)	702-16-3631	5-29-1943	
13. Freeman, Tom James	487-22-9889	3-15-1944	855
14. Tatum, Sollie W.	702-16-3648	6-21-1944	830
15. Dames, Fred W.	703-03-9711	12-13-1944	831
16. Johnston, Clyde W.	499-05-1272	1-21-1947	856
17. Wilson, Floyd	702-18-3225	11-10-1948	857
18. Capasso, Vincent	702-16-3894	11-10-1948	858
19. Gilley, Carroll	702-16-3647	8-15-1949	859
20. Richardson, Noel	489-18-8229	8-16-1949	832
21. Bolobraudic, E. D.	327-12-9103	11- 1-1949	860
22. Ruth, Clarence	490-03-1874	1-19-1951	833
23. Hantack, Joseph	702-18-6251	8- 1-1953	834
24. Wenzel, Wm. F.	431-20-6146	10-15-1953	861
25. McMillion, Lorn K.	500-28-9767	10-17-1953	835
26. Williams, G. W.	487-18-5737	10-18-1953	836
27. Case, James W.	489-18-7024	10-19-1953	862
28. Harper, Lawson W.	444-05-5280	1-17-1954	863
29. Smith, Carl V.	359-03-5017	4- 1-1954	837
30. Jackson, Francis M.	338-14-9060	4- 3-1954	838
31. Copeland, David J.	496-28-8237	4- 8-1954	839
32. Baker, Calvin E.	498-22-1494	5-19-1954	840
33. Mueller, Ralph H.	353-24-3172	7- 2-1954	864
34. Cliffe, Martin W.	495-28-0472	11- 5-1954	841
35. McBride, Clarence E.	346-14-4806	8-20-1955	842
36. Mezo, Paul	331-18-8526	9- 3-1955	843
37. Schaefer, Russel J.	494-01-6481	4-20-1956	844
38. Bender, W. W.	498-09-0538	6-19-1956	865
39. Rogers, Lloyd	351-16-5947	7-26-1956	866
40. Cotton, John L.	344-14-2632	1- 6-1957	845
41. Edwards, W. E.	490-24-5559	6-14-1957	847
42. Leonarti, Otis	500-10-7855	8-19-1957	869
43. Monsees, Oscar J.	491-07-7623	11-25-1957	868
44. McClearn, Guy H.	495-14-7369	12-25-1957	846
45. Whitfield, W. J.	430-01-7874	1- 2-1958	894
46. LeGrand, W. R.	351-03-1855	1- 5-1958	919
47. Derrington, C. W.	499-01-5478	1- 5-1958	918
48. LeGrand, W. L.	488-09-4746	1- 7-1955	917
49. Colcher, Clarence	490-01-3807	1- 7-1958	916

Exhibit K (Part) (Continued)

21st Street Car Department—(Continued)
Division No. 6, Carmen-Helpers

Name	Soc. Sec. No.	Seniority	Work No.
1. Ludwig, Melvin	494-03-7666	1-19-1943	878
2. Trusik, Paul	702-16-3632	5- 6-1943	872
3. Becker, Walter C.	702-16-3886	7-16-1943	854
4. Castleberry, Jos. (col)	491-12-6118	1-21-1944	856
5. Hawkins, Henry (col)	436-16-0128	2- 8-1944	859
6. Nash, Edgar (col)	491-16-7907	7-20-1944	862
7. Bagby, E.	702-16-3891	4- 7-1947	876
8. Shafer, Russell J. (Temp. Prom.)	494-01-6481	4- 8-1947	864
9. Ferririo, John	490-03-6798	6- 7-1948	850
10. McBride, Clarence (tem; Prom.)	346-14-4806	10-31-1949	839
11. Batey, Merrion M.	489-24-9562	4-18-1950	841
12. Cummins, Timothy K.	357-24-2077	4-19-1950	845
13. McClearn, Guy H.	495-14-7369	5-24-1950	837
14. Bruns, Robert P.	495-24-1206	7-12-1950	disabled
15. Cunningham, Calvin	486-03-5341	8-17-1950	826
16. Pierce, William E.	493-24-7874	9-15-1950	U.S.A.F.
17. Edwards, Wilber E.	490-24-5559	11-27-1950	824
18. Rogers, Lloyd D. (temp. Prom.)	351-16-5947	1-17-1951	827
19. Cotton, J. L. (temp. Pro.)	344-14-2632	2-15-1951	825
20. Tribble, Bobbie Lee	431-50-6949	5-22-1951	828
21. Lipski, Richard L.	499-28-4702	7- 3-1951	
22. Loraine, Lawrence E.	498-22-4141	10-23-1951	
23. Wisdom, Herbert J.	487-18-5243	11-13-1951	
24. Isaac, Thomas W.	432-40-1779	11-26-1951	
25. Holifield, William C.	489-28-5074	11-26-1951	
26. Angel, Robert	496-09-6523	4-24-1952	
27. Berding, M. J.	498-01-9847	4-29-1952	
28. Logan, G. W. (col)	428-20-5097	5- 5-1952	
29. Coplen, Eugene W.	720-12-5052	7-29-1952	
30. Chitwood, Vernon B.	496-32-8633	8-10-1952	
31. Callahan, Russell E.	487-18-0630	9- 9-1952	
32. Horn, Robert E.	490-26-1686	1- 7-1953	
33. Linam, Geo. A.	415-36-3320	1-13-1953	
34. Rosson, Wm. E.	414-36-2754	4- 3-1953	
35. Morgan, Victor	412-12-2375	5-20-1953	
36. Hays, Cornelius	294-03-5944	5-26-1953	
37. Gipson, Wess H.	431-20-3734	5-27-1953	
38. Sullivan, Theodore	434-28-5312	7- 2-1953	
39. Lackey, Leonard C.	441-03-7771	7-29-1953	
40. Hornbeck, Albert	498-10-1352	8-17-1953	
41. Keys, Albert Jr.	500-30-1341	8-25-1953	
42. Haggard, Harold M.	486-18-6429	9-24-1953	

[fol. 54] Transcript of Trial Proceedings

(Tr. 5) Mr. Mahlman: It is further stipulated that the upgrading date of March 1, 1950, for J. I. Smith, who follows plaintiff Tilton on the upgrading list of the Kansas City Terminal Division, Exhibit G, was in error and should have been April 12, 1950.

It is further stipulated that plaintiff Beck's work record, Exhibit L, is in error with respect to the date of upgrading which is shown as October 19, 1950, and that the actual date of his upgrading was October 12, 1951.

Is that correct?

Mr. Yost: That is correct.

[Testimony of Plaintiff Beck]

Direct Examination

(Tr. 14) Mr. Mahlman: I beg your pardon.

It's been stipulated that you were upgraded on October 12, 1951.

A. Yes, sir.

Q. Would you tell the court why you took setup status, why you decided to become a setup carman?

(Tr. 15) A. Well, when I hired out I thought maybe I could go ahead later on and take the carman job and be a carman and better myself.

Q. In what respect would that better you?

A. Well, it's better working, more higher pay.

Q. Would you tell us what plans you had at that time for your life's career?

[fol. 55] A. Railroad.

Q. Did you intend to work for the railroad as your life's work?

A. Right.

Q. Tell us what is the more desirable type of work, work of a carman or work of a helper?

A. Work of a carman.

Q. Did that in any way influence your decision to elect the carman status?

A. Right.

Q. Have you ever considered abandoning that status for any reason?

A. Not unless it's a further promotion higher.

Q. While you were absent in military service, Mr. Beck, what plans did you make about getting a civilian job when you got out of military service?

A. I didn't make no plans at all. I already had my job. I just went back to work for Missouri Pacific.

(Tr. 16) Q. Did you want to return to the Missouri Pacific?

A. That's where I had my seniority established.

Q. Would you tell us whether you have ever turned down any chances to do carman's work since you have been employed by the Missouri Pacific?

A. No.

• • • • • • •

(Tr. 18) Q. Mr. Beck, let me ask you this: Do you know from your own experience at Louisiana of any man who had been set up from helper to setup carman and who was downgraded back to helper for any reason other than the reduction in force?

A. No.

• • • • • •

[fol. 56]

(Tr. 20) DONALD I. TILTON

being produced, sworn and examined in behalf of the plaintiffs, testified as follows:

Direct examination

By. Mr. Mahlman:

Q. Would you state your name and address, please?

A. Donald I. Tilton, 330 North Oakley, North Kansas City, Missouri.

Q. Mr. Tilton, it's been stipulated that you were up-

graded from a helper to a setup carman at Kansas City on April 10, 1950. I wish you would tell the court why you elected to take setup carman status.

A. Well, about all my family have been carman and I wanted to get in that category myself. That is what I always wanted all my life, since I was a young kid.

Q. In your view was that a more satisfactory job or better job than a helper?

A. Yes, sir, it's a much better job.

Q. Would you tell us why?

A. Well, it's a lot cleaner job and it's more—you have to use your intelligence a little bit more than you do a helper's job. It's a more——

[fol. 57] Q. Have you ever considered giving any thought to abandoning this line of work and looking for something else?

A. No, sir.

(Tr. 21) Q. At the time you were absent in military service, what plans did you make about going to work when you got out of the service and were a civilian?

A. I took a leave of absence and I paid fifty cents a month to the union all the time I was in the service.

Q. Had you any intention of going to work elsewhere than for the railroad?

A. No, sir.

Q. Why did you want to return to the railroad?

A. I had my seniority established there.

Q. Have you ever turned down any chances to do carman work?

A. No, sir.

* * * * * *

Tilton—Redirect

By Mr. Mahlman:

(Tr. 27) Q. Did you ever have any complaints about your work?

A. Never did, no, sir.

* * * * * *

(Tr. 29) GUY H. MC CLEARN, JR.,

being produced, sworn and examined in behalf of the plaintiffs, testified as follows:

Direct Examination

By Mr. Mahlman:

Q. Would you state your name and address, please?

A. Guy McClearn, 3222 Caroline, St. Louis, Missouri.

Q. Mr. McClearn, it's been stipulated that you were upgraded from a helper to a setup carman on August 23, 1951. I wish you would tell the court why you decided to take the job of setup carman rather than remain as a helper.

[fol. 58] A. Well, as a helper you were restricted in some works, whereas a carman you gain more knowledge of the job, which you would like to get promoted to.

Q. Is there any difference in pay?

A. Yes, sir.

Q. At the time you made this decision, Mr. McClearn, what plans did you have for your life's career?

A. Well, I got a leave of absence when I got called back in the army and I was planning on coming back, railroad.

Q. At the time you were set up from helper to carman, did you have any plans about your life's work at that time?

(Tr. 30) A. Well, to continue with the railroad.

Q. Have you ever considered abandoning your railroad job or your carman job?

A. No, sir.

Q. While you were in military service, did you make any plans to the contrary?

A. No, sir.

Q. What plans did you make while you were gone?

A. Well, as I say, I got a leave of absence; I made plans to come back and return to my job.

Q. Why did you want to return to the job with the railroad?

A. Well, it's a pretty good job; I like railroad work.

Q. Have you ever turned down any chances to do carman

work while you have been employed by the Missouri Pacific?

A. No, sir.

* * * * *

[fol. 59] [Testimony of Smith, Chief Personnel Officer of Defendant]

* * * * *

Direct Examination

By Mr. Yost:

(Tr. 44) Mr. Smith: * * * and they were given a further incentive under that agreement so that after actually having performed the required number of days set up in that agreement, which was three years in that agreement of '42, to qualify them as a mechanic, then they did not automatically acquire a seniority date nor automatically relinquish a seniority date as a helper, but *they* were permitted an election at that time, either to acquire a date then as a mechanic or to return to the status of a helper and retain their seniority as a helper, which in some cases was more desirable than taking the mechanic's date.

Q. All right, then. To summarize your statement then because of the shortage of qualified carmen mechanics, and the shortage of apprentices, who were in the apprentice program, you made an agreement with the Brotherhood of Railroad Carmen that helpers could be upgraded and work as a carman, and then if they completed three years of actual work in that capacity they could acquire, if they so chose, carmen's seniority date; is that substantially what you said here?

A. Yes.

(Tr. 45) Q. Now, this 3-year work requirement meant three years of actual work, is that correct?

A. That is true.

Q. As an upgraded helper?

A. Yes, we required the actual work and actually kept

records of days worked in order to make sure that they had the required time.

The Court: How much was that time?

The Witness: Three years under the '42 agreement.

By Mr. Yost:

Q. It was 1040 days under the '53. What was the fact if a man was absent for any reason, such as strikes or personal injuries or was granted leave of absence for some personal reason, did he have to make up that time in order [fol. 60] to complete his 3-year service?

A. Well, he had to actually work the days. We didn't even count the days he was off in vacation in computing the number of days to constitute the year.

Q. In other words, a man was not entitled to a carman's seniority date on the third anniversary of his date of upgrade just because three years had elapsed?

A. That is true. He had to have three years, the equivalent of three years in working days, compensable work.

Q. Now, how was it decided, who made the decision that a man was to be upgraded from helper to a setup carman under

(Tr. 46) that '42 agreement?

A. There was a provision in there that these men would be selected by mutual agreement between the local supervision and the local committee of the organization, it being felt, of course, like we do in many agreements, where it is necessary for people to know individuals and their temperament and capabilities and so forth, we leave that with the people they are living with to make the selection, and that is the reason that was done.

Q. Were any qualifications set up in the agreement for that upgrading?

A. Only with respect to the amount of time in service, giving first, second or third preference down the line.

Q. Now, a man who had been upgraded by that process, was he considered to be a qualified carman after he had been upgraded?

A. We considered him a qualified man after he had finished the required time of working as a carman, yes.

[fol. 61] Q. By virtue of the specific terms of the agreement?

A. That is correct.

(Tr. 48) Q. After a man had completed his time under this '42 agreement, was he automatically given a carman's seniority date?

A. No, sir.

Q. What did he have to do first?

A. He had to make his own decision about it, as to whether he wanted to enjoy his date as a helper, which obviously was much earlier, or to acquire a new date as a mechanic, and look over the situation to determine in his own judgment as to what work might be available for him so he would be on the payroll, either as a helper or as a mechanic.

(Tr. 49) Mr. Yost: * * * All right, Mr. Smith, do you know of actual instances where men have refused to accept the carman's seniority date after completing their required time under the '42 agreement?

A. I probably couldn't name any individuals, Mr. Yost, but it is common knowledge that it has been done, and some of the reasons for which I know it isn't because they have had to upgrade some other men, because those men didn't take the carman's date, set themselves back.

Q. Now, take a man who has been upgraded under the '42 agreement, or even under the '53 agreement, and he is working as a carman, if at any time it should be proven by his work that he was not competent to continue with that work, is there any process or procedure or rules for downgrading him back to helper?

A. Nothing specific in the agreements at all, Mr. Yost, but that was handled by the local officers and the local committeeman, if they found a man who wasn't functioning, they would be able to get him, and he would step back.

[fol. 62]

(Tr. 54) Q. Now, will you tell us the background of that agreement? What led up to the 1953 upgrading agreement?

A. Well, there had been a movement which was on a national basis for certain adjustments in rates for carmen and proposals and counterproposals from the different railroads, and the carman's organization, and it finally ended up in a national agreement made by representatives of the carrier and the organization in June; in fact, it was the 4th of June, 1953, in New York City, and that agreement, among other things, provided for the upgrading of men and the actual employment of men if upgrading failed as men skilled in the handling of tools, so that the railroads could get

(Tr. 55) enough mechanics. So it was necessary to make an implementing agreement on the railroad which we did make in 1953, and gave it an effective date of August 1st, but didn't actually sign it until the 7th day of December.

Q. Did the Korean war result in a shortage of mechanics?

A. I don't know what caused the shortage, Mr. Yost, but even today we still have a need for mechanics.

Q. This 1953 agreement is still in effect, then?

A. Yes, sir.

Q. Because of the continued shortage of mechanics?

A. Yes, sir.

Q. Now, with respect to any man who had been upgraded prior to the effective date of the '53 agreement, what was to be done with those men under that agreement?

A. Well, we picked those men up, anyone who was upgraded at the time, and put them on the upgraded list and let them then have an opportunity to make an election at the completion of four years of service or 1040 work days, make an election to take a mechanic's date or go back to the helper job.

Q. Were all the men placed on this upgraded list in the order of their dates of upgrading?

[fol. 63] A. If the agreement provisions were all followed locally, that is what it required.

(Tr. 58) Q. Now, let me ask you under the 1953 agreement if qualified carmen are available to you can they be hired and placed on the seniority list even though you have helpers who might be upgraded?

A. Any time a fully qualified mechanic shows up and can meet our physical standards, and has a good clean record, he is employed immediately, and the one upgraded man is set back.

Q. Now, what are the sources of these fully qualified carmen from which you might hire a new carman?

A. Men who might be cut off at—on some other railroad, and then by terms of an agreement with the organizations, men who might be furloughed

(Tr. 59) mechanics at one point on the railroad in the twelve states could come to the place where there are upgraded men and immediately go to work and the upgraded man goes back to a helper.

Q. Now, reference was made to an agreement that we have on the Missouri Pacific of giving apprentices who complete their time after return from military service a retroactive seniority date. Do we have such an agreement on the Missouri Pacific?

A. For apprentices?

Q. For apprentices?

A. Yes, sir. Yes, sir.

Q. Can you tell me why we have such an agreement for apprentices?

A. Well, because of the fact that the apprentice has only term seniority and when he finishes h actual time of training he automatically loses that date and automatically acquires a mechanic's date, so we felt that we should make that sort of an agreement for a man who was absent in the military service.

[fol. 64] Q. When was this agreement giving the apprentices an automatic seniority date upon completion of their time, when was that entered into?

A. In the basic agreement it was—I cannot give you the date.

(Tr. 60) The exact date is something about five years ago;

but the principle of it was set up in the upgrading agreements of 1942 and I believe so stated in some paragraph in there.

Q. Now, we have never entered into such agreement for upgraded helpers; why is that?

A. Well, the reason that we have not is because we didn't feel that we had the right, neither the organization nor the carrier, to make that election for a man, because it was his livelihood involved, and he could look the situation over and make his own election, and if we upgraded him and put him in a status the same as an apprentice, we might have a little difficulty in getting him to take it in the first place.

Q. Has the Brotherhood of Railroad Carmen requested us to enter into such an agreement?

A. No, sir.

Q. Now, do helpers have any rights under the basic agreements apart from these two upgrading agreements that we are speaking of, do they have any rights under the basic agreements which are identified as Exhibits A and C to the stipulation to be promoted to carman?

A. I haven't seen those exhibits. I don't know what the exhibits are.

Q. Those are the basic agreements containing all the working rules.

A. If you mean right of promotion of a helper?

(Tr. 61) Q. That's right, is there any rule in there that gives him any right of promotion from helper to carman?

A. No, sir.

• • • •

Smith—Cross

[fol. 65] By Mr. Barnes:

(Tr. 64) Q. Now, you have testified that these men, when they completed their three years or thousand and forty days of work, did not automatically acquire carman seniority. As soon as they made an election, the railroad had no choice but to give them the seniority, did it?

A. Under the '42 agreement?

Q. Under either the '42 agreement or the '53 agreement.

A. That's right.

Q. In other words, as soon as they completed the work requirement, made the election as of that time, they became carmen and drew a seniority date?

A. Correct.

• • • • • •

(Tr. 66) Q. Now, you said that you knew of instances where men had refused to accept a carman date, in other words, he refused to accept seniority as a carman; would that not frequently be due to the fact that they had so much helper seniority that they would almost as soon be assured of work as a carman helper whereas as a carman they would be at the bottom of the list?

A. I think I testified substantially to that.

Q. Wouldn't there also be circumstances where a man, because of age, or physical limitation, might feel that he might be called on to perform work that was beyond his capacity and he therefore would prefer to stay within the more secure area of carman helper?

A. He might find that as a reason for making a determination, yes; that is up to him.

• • • • • •

(Tr. 68) Mr. Barnes: What you do find, then, is that men accept the set back?

A. Yes.

Q. And that you do not know of an instance where a [fol. 66] man against his will, now, refused to accept a set back has been set back?

A. No, because if it was against his will he would have a grievance procedure to follow and I would probably know about that.

Q. So to your knowledge there has been no such instance?

A. Of where a man has objected to being set back, no.

Q. Now, if I, again, if I understood you correctly, you said that when set up men had been set back, they were

not setback up in accordance with their original upgrading date?

A. According to the 1953 agreement, that is correct.

Q. As between a setup man who had been set back, wouldn't it—and leaving out of parenthesis a journeyman or anything like that, but as between a setup man who had been set back

(Tr. 69) because of a reduction in force, isn't it true that the man with the oldest date of upgrading would get first choice on being set back up?

A. That would be a natural thing to do, yes, sir.

Q. Now, I'm not sure I follow your reasoning, Mr. Smith, when you said, if I can recall correctly, that your reason for not giving the helpers the same sort of a shake that you have given the apprentices—I say helpers, I mean the setup men who advanced from helpers, was that the apprentice lost his term seniority at the completion of his apprenticeship?

A. Automatically.

Q. Automatically, whereas the carman had an opportunity to revert back to helper?

A. Correct.

[fol. 67] Q. Well, now, I can see why you would automatically give an apprentice who completed his apprenticeship a job as a carman because otherwise he's got no place to go, but I don't follow you on making the distinction in retroactivity.

A. Well, here it is. I believe I stated before that we had to make this attractive proposition for a helper to move up into an upgraded status and he would very likely not take, in many instances, an upgraded status if he was going to then be subject to a rule which said that after having served a certain period of time in the upgraded status he would (Tr. 70) automatically lose his helper's date, and automatically acquire a mechanic's date, because that might actually cut him out of his bread and butter.

Q. I think I understand your distinction. One or two more questions, Mr. Smith.

Isn't it a fact that in selecting men for setup, the senior

man as carman helper normally had first choice on the vacancy?

A. No, sir, not always. We discussed this in our negotiations and the reason we left it to the local committee people, there are some men who have spent a lifetime working as a helper, and obviously they would not at all be interested in going up to an upgraded position, and we wouldn't want them to do so, because he wouldn't be able to do the work, and for many reasons, some men may be are working as helpers that might have gotten into the service who couldn't even read and write.

• • • • •

Smith—Redirect

By Mr. Yost:

(Tr. 72) Q. All right, as between two men working as helpers who had equal ability, let us say, was the practice to select the senior man for upgrading?

A. Yes, generally, yes, if he had the same qualifications they would do that.

[fol. 68] Q. All right. As between two men working as helpers who did not have the same ability in the opinion of the local committee and local master mechanic, was the man selected for upgrading who had the greatest ability?

A. That was the general idea of the agreement, making the selection locally by the superintendent and the local representatives of the organization.

(Tr. 73) Q. And in making that selection they could ignore the seniority of the helpers?

A. They could.

• • • • •

(Tr. 74) Q. Mr. Smith, in cross-examination this morning you were asked whether you knew of any names of men who had been upgraded and then subsequently downgraded back to helper, and you said no, you didn't know of any specific names at the time. Now, have you been able to learn of any such instances in our lunch hour today?

A. Yes. During the lunch hour I was able to get ahold of the personal record file of one man who was set back and considered not capable of performing the work.

(Tr. 75) Q. What was that man's name.

A. His name was Albert Hornbeck.

Q. Where did he work?

A. At St. Louis.

Q. Does the record show when he was upgraded?

A. He was upgraded the last time on May 22, 1956, and he was set back on account of not qualified on June 6th of the same year.

* * * * * *

Smith—Recross

[fol. 69] By Mr. Barnes:

(Tr. 76) Q. Mr. Smith, when was Mr. Hornbeck originally set up?

A. Made a little transcript of his full record if you would —if that will answer your question. He was first employed September 11, 1945, as a car helper, but he was furloughed in 1948. Then in 1952 he sought a job and was employed in the maintenance-of-way department as a water service helper, but on August 14, 1953, he then asked to be employed again as a carman helper, and that was granted to him, then he was furloughed again October 29, 1953, because of lack of seniority, then he was recalled to work as a carman helped on July 18, 1953.

(Tr. 77) On March 23, 1956 he was temporarily upgraded to a carman, but he was set back on April 25, 1956, in reduction of force. Then he was recalled or set up again on May 22, 1956, and then disqualified and sent back on June 7, 1956, to a helper.

Q. How many days of service did he have at the time he was set back as a setup carman?

A. The last time?

Q. No, the whole time as setup carman.

A. Take a little computation. It was approximately a month from March 23rd to April 25th, and then from

May 22nd to June 7th, which would be about half a month, a little more than that, so you might say a month and a half all told.

Q. Well, that is calendar time?

A. Calendar time, and I do not have the actual days of work, but there would be a record of him being set back or up, and whether he was laying off or not, I don't know, but in those weeks, six or seven weeks, you would say about thirty-five days.

* * * * * * *

[fol. 70] (Tr. 78) By Mr. Barnes:

Q. Now, Mr. Smith, the last paragraph of Defendant's Exhibit 4 says, as I read it, that Hornbeck agreed that he was satisfied to go back as a helper oiler, which he can handle as an oiler on journal boxes, that he was satisfied to go back?

A. Yes, he said that in writing.

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[Testimony of W. H. Bond, General Chairman of the Carmen on Missouri Pacific R. R.]

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DIRECT EXAMINATION

(Tr. 92) Q. Now, when they had to find men to upgrade in order to get the carmen's work done, did they look for the best qualified man or did they look for the senior man?

A. Well, we like to recognize the principles of seniority very much and we tried to follow that as close as we could. There was, I think, both the carrier and the employees realized that we couldn't say we were going to take everybody. We had the question of age, where a man is sixty years old, he got his time served, he would be on retirement, or you could go to capability, mental or physical, and you had other things. It wasn't like chronic layer off, things like that. They wasn't taking straight seniority.

We tried to observe that as near as possible, and we didn't always agree on it the first time on some of those things, but it was agreed to by both parties under those circumstances.

Q. Well, in other words, if you didn't think a man was qualified to be upgraded, you could turn him down even though he was a senior man, is that right?

A. That's right.

* * * * * *

[fol. 71] (Tr. 94) Mr. Yost: I'm sorry.

Mr. Bond, after a man has been upgraded under the provisions of that '42 agreement or the '53 agreement, is there any procedure for downgrading him back to helper if he proves he isn't competent to continue on with that work?

A. Well, yes. We have had people taken off as upgrading and put back as a helper. This has been tried to be handled on a voluntary basis and explain to them their shortcomings, and I believe only one case has come to the office of the general chairman here since I have been on the job.

* * * * * *

(Tr. 105) Q. (By Mr. Yost) After the completion of the work requirement for promotion to carman under either 1942 agreement or the 1947 arrangement or the 1953 arrangement, was the promotion to carman from upgraded helper automatic at any time upon the completion of their work requirement? Was that automatic?

A. Well, most of them made an election. It says they will make an election to make it. I know of a case or two even after they served their time that it was questioned about their ability and so forth. I don't think—it was left up to the employee, I would say, more. Of course, I would say it's the prerogative of the company on that. It's not automatic, I don't think.

Q. What I'm getting at is, that he wasn't automatic-

ally taken off of the helpers' roster, put on the carmen's roster on the day he completed 1040 days?

A. Oh, the agreement provides how he goes on.

Q. He has to do something in addition to just completing that time, isn't that right? What does he have to do?

A. Well, he would have to make application for the [fol. 72] job and give up his rights as a helper and ask to acquire seniority. You got to make a sacrifice of seniority. It's considered a property right.

(Tr. 106) Q. Did all the men always take that carman seniority and relinquish their helper seniority?

A. No, sir.

Q. Some refused to take that?

A. Yes, sir.

Q. I see. Were there also upgraded helpers who failed to complete their work requirement?

A. You mean failed to get in enough time?

Q. Yes; yes.

A. Well, I have——

Q. For one reason or another?

A. I have the records of the employees I represent as local chairman that was set up in the year 1950, and there's less than half of them that's completed their time right now. We have their names and files right here.

Q. Well what I mean is did some of them, rather than continuing on in the upgraded capacity, did they choose to go back to work as a helper?

A. Yes, we had people set theirs back, yes. That was not in any big number but quite a number at that.

Bond—Cross

By Mr. Barnes:

(Tr. 107) Q. Let me ask you this: What would be your attitude at present if a man, tomorrow, were to complete a thousand and forty days as a setup carman and the company said, "No, no, we're not going to put you on the carman seniority roster," wouldn't you go in there and say, "Well, now, look here, under the agreement you've

got to put him on the seniority roster, under the present agreement"?

[fol. 73] A. Well, I think if we had somebody like that he would be probably so left-handed that they would have something to talk about. I only know of about one instance of that happening.

Q. Yes, Mr.——

A. We're here to represent the people we represent, and the man served his time, unless he had something radically wrong with him, we would insist that he be put on there.

Q. Wouldn't you be violating your agreement if he wasn't put on, if you didn't insist that he be put on? Now I'm not talking about somebody who is, say, halfway (Tr. 108) along in their work requirement. I'm talking about somebody who isn't so left-handed that the company has let him stay on and work a thousand and forty days as a setup requirement. Doesn't your agreement give that man—the word "automatic" has been tossed around, doesn't it give him the automatic right to do one of two things: Take carman seniority or go back to carman helper's lists?

A. It provides for him making a choice there. It's if he——

Q. And the company has nothing to do with that choice?

A. Well, I don't know. We had one fellow up here at my hometown that they—that they raised an objection on, and he's quite a ways off. With any normal—anything normal, we would insist that he be put on there, yes, I agree with you on that part.

Q. All right. Now, under this—one other thing. You said that only about half of the men who had been upgraded in 1950 had completed their work requirement. I believe you said that.

A. I said that.

Q. Some of them are dead, aren't they?

A. Some of them are dead.

Q. Yes, sir.

[fol. 74] A. I'm talking—yes, some of them are dead, yes.

(Tr. 109) Q. And some of them have gone, taken other jobs somewhere else?

A. That's true.

. . . . .

(Tr. 112a) Q. You did say, if I understood you correctly, that you had only one occasion when you had had a man set back to a helper, where you had had to go into it with the railroad?

A. Yes, sir, I think that——

Q. What was the outcome of that?

A. The man was upgraded again.

Q. I see. You were successful in persuading the railroad of your point of view?

(Tr. 113) A. Well, there's every case the facts is not developed. We sometimes think they are pretty hard to get along with; other times maybe they got merit to their side. I think they recognized our merit in this case.

. . . . .

(Tr. 114) Q. Yes, but let me ask you this: Did you ever have an occasion when a man who wanted a job as a setup carman, he wanted to move up, and he was a senior man among those who wanted to move up, did you ever have a case when he didn't move up?

A. He was a senior man and wanted——

Q. He was the senior man; you've got a list of helpers here and here's several here at the top who for one reason or another don't want to be set up, then here you have got, say No. 6, who is the oldest man in point of seniority on the common helpers' roster, he wants the job, there is a vacancy as a setup carman and he wants it. Has there been ever an occasion when a person in that position didn't get it?

A. You're asking me the question when a senior employee

(Tr. 115) wants the job does he always get it?

Q. Well, in moving from helper to setup carman, yes,

[fol. 75] that is the question I'm asking, if he puts in a bid on the job and says, "I want it"?

A. You don't put in bids in the first place, and we have had exceptions where the oldest wanted the job wasn't set up.

Q. How many times has that happened?

A. Oh, that is very limited. I just got one in my mind at the present time.

Q. Exactly.

A. I believe I know of two.

Q. As I recall it, Mr. Bond, when I talked to you in your office last Friday with Mr. Rosso, one of my associates along, you told me at that time that you had only one example in mind at that time.

A. I think we was referring to the Ritten case that come in as a matter of record.

Q. Yes.

A. And we have it here in court right now.

* * * * *

Bond—Redirect

By Mr. Yost:

(Tr. 119) Q. Well, now, I understood you to say in answer to their cross-examination that among those men who wanted to be upgraded, where there was an opening, the senior man was always hired except in one case that you know of. In other words, you knew of one case where it wasn't done.

A. Where the senior man——

Q. Senior man was——

A. No, senior man wasn't always upgraded, I only knew of one case, or maybe two, where the senior man that wanted it. We had senior men that turned it down on account of age.

(Tr. 120) Q. In other words, the case where you're talking about is where he wasn't considered qualified enough to be upgraded, is that right?

A. That's right.

Q. That is based on your personal knowledge of the [fol. 76] Sedalia situation, isn't that what you're talking about there?

A. How is that? I don't get that.

Q. Well, you say you only know of one instance. You don't know of all the instances on all the various points on the railroad?

A. No, sir, this is just a point where I happen to be local chairman at Sedalia.

Q. And that was at Sedalia, Missouri?

A. Yes, sir.

Q. So there could be other instances where the senior man was not upgraded because he wasn't considered qualified, isn't that right?

A. Well, another instance happened right here where the case came to this office where we got it changed, yes, sir. He was later upgraded.

(Tr. 121) Q. I mean that promotion then to carman did not depend on how long they had been upgraded, but depended on their actually working out this time?

A. Working out their time.

Q. That is what I am getting at. It wasn't simply a matter of their seniority?

A. No, sir. We had people that refused to be upgraded and later was upgraded and that changed their seniority status from a difference on a helper's list—I mean be different when it got on the mechanics' list.

Donald I. Tilton—Direct

By Mr. Mahlman:

(Tr. 123) Q. Mr. Tilton, you have been employed, according to our stipulation, since July of 1949, by the railroad at Kansas City. I want to ask you if you can tell me on the basis of your own personal knowledge, having been employed there that long, whether you can recall any single instance where the man with the greatest seniority on

the helper's roster, who wanted a vacancy in the setup carman status, didn't get it?

A. I have never known that to happen.

[fol. 77] Q. Now, I want to ask you one other question: When it is necessary for one reason or another for men to be set back from setup carman back to helper status, in what order are men set back?

A. The youngest setup carman.

Q. In the time that you have been employed in Kansas City by this railroad, do you recall any instance when men were set back in any other order?

A. No, sir.

(Tr. 124) Q. One other question, Mr. Tilton: Can you recall of any instance where a man has been set back from setup carman back to helper for any reason other than either there was a reduction in force or he voluntarily relinquished his setup status?

A. No, sir.

Guy H. McClearn, Jr.—Direct

By Mr. Mahlman:

(Tr. 125) Q. Mr. McClearn, it's been stipulated that you have been employed here at St. Louis by this railroad since May of 1950. In the time that you have been employed here, sir, can you recall of any instance where the senior man on the helper roster who wanted a vacancy as a setup man did not get that vacancy?

A. No, sir.

Q. Would you tell us in what order a setup men were set back to helper status in the event of a reduction in force or some reason such as that?

A. Well, the older, the last man laid off or set back to helper (Tr. 126) is the first one recalled to be reinstated back to a helper's setup helper.

[fol. 78] Q. Do you know of any instance where anyone was ever set back for any reason other than either a reduction in force or because the man wanted to relinquish his status?

A. Not to my knowledge.

* * * * * *

Wilford L. Beck—Direct

By Mr. Mahlman:

(Tr. 126) Q. Mr. Beck, according to our stipulation, you have been

(Tr. 127) employed at Alexandria, Louisiana, by the Missouri Pacific since May 1950. I would like to ask you, sir, if you can recall any instance since that time at Alexandria where a senior helper, who wanted a vacancy as a setup man, didn't get a vacancy when it occurred that he wanted?

A. No.

Q. Would you tell us in what order setup helpers were set back in the event of a reduction in force?

A. How?

Q. Yes, in what order.

A. Youngest man cut off first.

Q. Do you know of any instance where any man at Alexandria was ever set back from setup status to helper for any other reason or in any other order?

A. No.

* * * * * *

[fol. 79] Beck—Cross

By Mr. Yost:

(Tr. 128) Q. Mr. Beck, do you know an S. J. Gilliet?

A. Gilliet.

Q. Does he work in Alexandria?

A. Yes.

Q. W. C. Johnson, do you know him?

A. Yes, sir.

Q. Does he work in Alexandria?

A. Yes, sir.

Q. What capacity are they employed?

A. They are helpers, carmen helpers.

Q. How long, if you know, how long have they been carmen helpers? About?

A. Been over fifteen years. They already worked as temporary carmen before and turned it down.

Q. That is just what I wanted to get at, so you have answered the question. They worked their time then?

A. Worked their thousand and forty days and turned it down. Also another man there too.

Mr. Yost: All right, that is all I want. Thank you.

(Witness excused.)

* * * * *

[fol. 80] O. L. Dobbelaere—Direct

By Mr. Mahlman:

(Tr. 129) Q. Would you state your name and address, please?

A. O. L. Dobbelaere, 811 North Montegall, Kansas City, Missouri.

Q. What is your present employment, Mr. Dobbelaere?

A. I work for the Missouri Pacific Railroad as a car inspector in the yard.

Q. You are a carman, is that right?

A. Yes.

Q. When were you first employed by the Missouri Pacific?

A. October 15th of 1948.

Q. As of what date have you been a journeyman carman mechanic?

A. You mean as a permanent carman?

Q. That's right.

A. That was December 11, 1956.

Q. Mr. Dobbelaere, I want to ask you if in the time since you have

(Tr. 139) been employed at Kansas City, since 1948, can you tell of any—do you recall any instance where a helper who was the senior helper, who wanted the vacancy, wanted a vacancy as setup carman and did not get that vacancy?

A. No, not to my knowledge.

Q. Would you tell us in what order men who have been set up to carmen are set back to carmen helper status in the event of a reduction in force?

A. The last man that would be set up would be the first man set back.

Q. Do you recall any instance where anyone was ever set back other than pursuant to that arrangement?

A. No, not to my knowledge.

* * * * * *

[fol. 81]

[Testimony of Defendant's witness G. W. Johnson, Assistant Chief Personnel Officer of Missouri Pacific R. R.]

* * * * * *

Johnson—Direct

By Mr. Yost:

(Tr. 148) Q. I didn't have reference to setting them up from helper to carman. I had reference to giving them a permanent date as a carman after they had been set up for the required period of time.

A. No one would be eligible to exercise the option to become a journeyman mechanic until he has served the required number of days and it would not necessarily be in the order in which they had been set up.

* * * * * *

(Tr. 150) Q. I want to hand you now Plaintiffs' Exhibit H and ask you if that is a letter directed to you from Mr. Bond dated October 1, 1957, referring to that conference to which you just had reference?

A. This letter is addressed to Mr. B. W. Smith, Chief Personnel Officer, attention G. W. Johnson, which confirms, it says, a conference with me on August 7th, 1957, which included some eight items in the discussion.

Q. Does one of those eight items refer to this particular problem?

A. Yes, Item 8, the last item on this letter, refers to the discussion concerning the retroactive date for employees who had returned from military service.

Q. I would like for you to read that to the court if you please.

A. It is Item No. 8.

> "This item concerned the re-employment of employees in military service and requested that they be permitted to be upgraded or if upgraded, permitted to finish their time and be given retroactive date. Mr. Johnson advised that he did not want to afford them that and that the rule

[fol. 82]

> (Tr. 151) did not provide for this. He also stated that he did not care to enter into an agreement, particular reference made to Mr. Kaiser's case, Hoisington, Kansas, and Mr. Tilton's case, Kansas City, Missouri. This subject is to be held in abeyance for the time being as no request was made by System Federation #2 and the matter was first discussed with Mr. Johnson at his request."

That is signed by Mr. W. H. Bond, President, and Mr. R. E. Martin, Secretary-Treasurer, System Federation No. 2.

Q. Mr. Johnson, can you explain why you did not want to enter into an agreement of that sort with the union?

A. When I first became acquainted with this re-employment problem in early '49, at the time Mr. Short was Chief Personnel Officer, these matters were directed to me, and in view of the fact that the Congress had enacted legislation dealing with the rights, or re-employment rights of veterans, we at that time arrived at a policy that we

would not make the re-employment rights of veterans a subject of agreement, but that we would record them such rights as were provided by law. We felt we could do no less and should not be asked to do more. That policy has not been changed, although it has been re-examined by me personally on two occasions.

Johnson—Cross-examination

By Mr. Barnes:

(Tr. 152) May I have Plaintiffs' Exhibit K?

I suppose you are not familiar with the testimony which Mr. Smith

(Tr. 153) gave earlier in this case, Mr. Johnson, but in response to a question as to whether there had ever been an instance when a man had been set up, temporarily advanced to a helper, and who had been set back for lack of qualifications, he was able to come up with the name of only one man, one A. L. Hornbeck. Now, I ask you to [fol. 83] examine Plaintiffs' Exhibit K, which was furnished to us by the defendant, which is the work record of Mr. Hornbeck.

A. All right.

Q. Would you tell me the total number of days that he worked as a setup man before he was set back?

A. It shows here twenty-eight.

Q. Twenty-eight days. Now, as a corrollary to Rule 13(a), which ideals with the right to bid on vacancies, isn't it true that Rule 13(h) gives a man thirty days to qualify in the job?

A. A man that is assigned to a job would have thirty days within which to qualify under that rule.

Q. Mr. Hornbeck did not have thirty days?

A. Well, his number of days worked apparently were not thirty, but his period from the time set up until he was set back exceeded thirty.

Q. I recognize that, but he only worked twenty-eight days?

A. That is what it shows there.

(Tr. 155) Q. Now, you told Mr. Yost that when a man completed his carman seniority, his work requirement for carman seniority, he was set up. I mean he was given that date?

A. If a man is selected for temporary work as a carman, and after he has completed the prescribed time in service as such, then he would have an option.

Q. And that is the employee's option?

A. Yes, it would be his option.

Q. Either to set back to helper or to keep on with taking the bottom of the carmen's seniority roster?

[fol. 84] A. Yes, he would have an option then to elect between accepting the date as a carman, the day he finished his required time or,—and if he did that, he would have to at the same time relinquish all seniority as a helper.

(Tr. 156) Q. Yes, sir.

A. If he didn't choose to do that, of course, he could just remain a helper.

[fol. 85]

Testimony taken by Depositions in Kansas City (hereafter called "KC Tr.")

[Testimony of employee Ford]

* * * * *

(KC Tr. 3) Q. Do you recall when you first set up to temporary carmen?

(KC Tr. 4) A. Temporary carman? 1st, '48.

Q. January '48?

A. January '48.

Q. And then do you know how long you worked before you got your carman seniority date?

A. Well, I was permanent mechanic February '51.

* * * * *

By Mr. Barnes:

(KC Tr. 6) Q. You don't know? During the period, Mr. Ford, that you were employed as a carman helper and later as a setup man and later as a permanent carman, did you ever know of a setup man to be bumped back to helper for lack of ability to perform the work?

(KC Tr. 7) A. No, I never knowed.

Q. Occasionally people were set back for reduction in force?

A. Reduction in force, they were set back, yes.

Q. Occasionally there were people who for one reason or another requested to be set back, is that a fact?

A. I believe so, yes.

* * * * *

[Testimony of employee Ogle]

* * * * *

(KC Tr. 25) Q. During this period from May of 1947 until August of 1953, which is the period during which you were hired, were set up and got your seniority date, do you know what the practice was with reference to how and when you got your permanent seniority?

[fol. 86] A. Just what do you mean? Of carmen, or what?

Q. As carmen. In other words——

A. 1952.

Q. What did you have to do to get that permanent seniority date?

A. Had to work four years and one day.

Q. Right. Have you ever known a setup man, a temporary carman, to be set back to helper for lack of ability?

A. No; not that I know of.

Q. I assume you have known a man that was set back for a reduction in force or for a strike?

A. Only way I know they was set back would be a layoff or somthing like that.

(KC Tr. 26) Q. Right. How are the people who are to be

set up to temporary carman selected, on what basis, if you know?

A. Well, got to have so many days in.

Q. So many days in as what?

A. As the four years and one day.

Q. Well, now, we are talking about two different things. You are talking about permanent carmen; I am talking about the time when you are set up to helper, to temporary carmen.

A. That is what I am talking about. I am talking about setups. You might work—you may get six months in, you may get eight months; they might turn around and have a layoff and you might get set back. I have had to lay around until——

Q. I am talking about how you get to be set up in the first instance. In other words, you went to work in November of '47 and you were set up in November of '48——

A. That is up them. If they are short in men or everything, why, they set them up.

[fol. 87] Q. Does seniority as carman helper have anything to do with their being set up?

A. Sure, they go by seniority, yes. They call the first man and go right on down the road.

Q. If I understand you, they call the oldest helper?

A. That is right.

(KC Tr. 27) Q. Are there times when the oldest helper does not want to be set up?

A. That is right.

Q. But it is his choice?

A. It is his choice; he can turn it down. And I know a lot of them has turned it down three or four times.

Q. Usually do you know why that is?

A. Because they don't want to lose their seniority as an oiler or——

Q. In other words, high seniority as a helper?

A. Whenever you get to carman you drop all your seniority and start at the bottom and go up.

• • • • •

[Testimony of Tony Rodina, Financial Secretary of Carmen Local 36]

(KC Tr. 39) Q. You just go ahead and enlighten me in your own words.

A. What I am trying to say now, the company needed mechanics and they couldn't hire any mechanics, so their next step was to upgrade some helpers.

Q. And would seniority as a helper have anything to do with who was selected for upgrading?

A. Seniority of a helper, yes. We started out with truckmen; they were first on the list to be set up. And then apprentices, regular and helper apprentices, accord- [fol. 88] ing to their seniority. And then the last came the helpers.

Q. Also according to their seniority?

A. According to their seniority.

Q. Now, did you have occasions when a carman helper would refuse a setup?

A. We have.

Q. Is that usual or unusual?

A. It is usual.

(KC Tr. 40) Q. To your own knowledge why would a carman helper refuse a setup?

A. Well, back there in that early period——

Q. Well, now, wait. Let me interrupt you. We are talking now specifically from the period from '47 to '53.

A. Okay. In that period a helper working seven days a week would make more money in thirty days than a carman that at that time would only work six days, see. So that was the reason why some of them turned it down.

Q. Would their position on the helpers' seniority list also be affected, so that might cause them to turn it down.

A. I didn't catch that.

Q. Would their position on the helpers' seniority list also be a reason that they might turn it down?

A. Well, it could be.

Q. In other words, if they were the oldest or the second oldest helper on the list they would be more likely to turn it down than a man who was low down on the helper list?

A. Well, that could be a reason; but I don't know that that was the reason.

Q. Do you know of your own knowledge, Mr. Rodina, of an instance where there was a vacancy for an advanced helper, that is, a vacancy in the carman craft, where the senior man who was willing to take it did not get the job, [fol. 98] the (KC Tr. 41) senior man on the helper list? I had better rephrase that question. Assuming, Mr. Rodina, that there were no truckmen, apprentices or helper apprentices available to fill a setup job, do you know of an instance where the senior helper that wanted the job didn't get it?

A. No.

Q. Do you know of an instance, and I will extend this now to the entire period of your employment with Missouri Pacific, where a man who had once been set up was set back for lack of ability?

A. No.

Q. Do you know of an instance where a setup man who had completed his three years or four years or 1,040 days, whatever it was at the time—do you know of an instance where he wasn't offered his carman seniority after he had completed his work time?

A. Well, the only one instance I can refer to is when we had a reduction in force. I can't tell you the exact date without looking in my record. A man that went out this time about the same time we had the reduction in force, and they didn't find that he had the number of days required to be mechanic and they didn't ask him at the time. But they set him back and found out later that he had the (KC Tr. 42) number of days, that he could have stayed as a mechanic. But he didn't do anything about it himself individually; so nothing was done.

Q. I see. In other words, it was an oversight and he didn't take any steps to correct it?

A. It was an oversight on both sides, with the Committee and also the man himself.

* * * * *

[fol. 90] Testimony of A. F. McMain, Local Chairman of Carmen at Alexandria, La. (deposition taken at Alexandria, hereafter called "Al. Tr.")

(Al. Tr. 3) Q. How long have you been local chairman, Mr. McMain?

A. Well, the last time, since 1952. Along about October of '51 was the last time, but I was local chairman in 1940, up through 1944 or '45. Then I went back in '48 and held it until December of '50, as local chairman.

Q. And then you were again local chairman in the fall of '51?

A. That's right, to the best of my knowledge. Of course there may be little variations.

Q. Mr. McMain, during the time you have been local chairman, and also during the time you have been employed by the Missouri Pacific, can you tell me of an instance when (Al. Tr. 4) a man who has been set up to temporary carman has been set back to carman helper for any reason other than reduction in force, or with his own consent?

A. Well, I don't know of any man that has been set back on account of not being capable of performing his work. I do know of three instances where a man completed his thousand and forty days and of his own choosing chose to go back to his seniority as a helper, turning down the permanent carman job.

Q. Who made that choice or decision, the railroad or the man?

A. The man.

Q. Am I correct in saying that he could have elected to take carman seniority if he had wanted to? In other words, his choice was to take carman seniority or to be set back to helper?

A. He chose the helper seniority in preference to the permanent carman seniority.

[fol. 91] Q. In the usual case, Mr. Yost, if you know, why would a man do that?

Mr. Yost: Are you talking about Mr. McMain?

Mr. Barnes: I mean Mr. McMain, I'm sorry.

A. Well, there's various reasons.

Q. (By Mr. Barnes) Well, would one of them be that he had very high seniority as a helper?

(Al. Tr. 5) A. Some of them enjoy quite a number of years seniority as a helper. Then they would rather hold a daylight job as a helper than to hold a night job as a permanent carman in the train yard union station.

Q. Has there ever been an instance to your knowledge where a man finished his time as a helper, that is, whether it was a thousand and forty days or four years or three years, whatever it was at the time, who was refused carman seniority by the railroad?

A. Not after he had completed his time.

* * * * *

(Al. Tr. 7) Q. Mr. McMain, I am going to ask you to read Rule 13 (h) in that '49 agreement and consider the answer you just made.

A. (Witness reads document)

Yes, it says "not to exceed thirty days."

Q. Then when a man has completed thirty days as a set up man, in actual practice what are his rights, so far as going on and finishing his thousand and forty days? Does he have a right to go ahead and work them out, or can he be set back at any time?

A. Well, that depends on the force that is needed.

Q. I'm talking about excluding reduction in force, assuming that the job is there.

A. He can give a letter stating that he doesn't want the temporary set up job, that he would rather go back to helper. [fol. 92] But when he does that, then he has to wait until all the eligible employees are permitted to exercise their seniority on the temporary basis.

Q. Well, once he has got his thirty days in, does he have any right to keep on as a temporary man, providing there is work available?

A. Yes, he has the right to continue.

(Al. Tr. 9) Q. And I want to ask you, is it reasonable to believe that work would have been available to Clarence Moore when it was not available to Earnest Knox?

A. Well, under the ordinary circumstances, the man with seniority should be working over the union man.

Q. In other words, if there was work available Knox would have had first call on it over Moore?

A. That's right.

(Al. Tr. 15) Q. All right, let's take this situation. Suppose you have a helper who wants to take a carman's job because there's a vacancy available, and he comes to you and he says, "I'd like to take that carman's job," and you and the local committee decide he can't read or write, he can't learn the rules, but he is a senior helper. Does he get that job?

A. No, if he can't read and write the English language.

Q. In other words, if he is not qualified to take that job he doesn't get it, does he?

A. No.

Q. All right. Then it's not a matter of seniority, is it?

A. It's not a matter of seniority.

Q. Okay, that's what I want to know.

A. It's a regular routine. You drop on back down to the man that is available.

[fol. 93] Q. And that's qualified?

A. That's right.

Q. So that you don't——

A. You have to qualify him within thirty days.

(Al. Tr. 16) Q. You can't put a helper on a carman's job just on the basis of seniority, he has got to be qualified to be upgraded, isn't that right?

A. There's not but one instance where we have ever failed to qualify a man on account of not being able to read and write the English language or have a fair knowledge of the A.A.R. rules, and that was Charles Ballard.

Q. All right.

A. All the other men have been set up and have made good on the job.

Q. But the fact that there was one instance where a man was deemed not qualified means that he doesn't get the promotion solely on the basis of seniority, isn't that correct?

A. Well, he doesn't—it was not the basis of seniority, it was the basis of his qualifications, not being able to read and write the English language. That's what disqualified him. It tells you——

Q. Who disqualified him on that basis?

A. The committee and the general car foreman.

* * * * * *

(Al. Tr. 27) Q. Now, with reference to Mr. Ballard, you say he couldn't read or write and couldn't get the A.A.R. (Al. Tr. 28) rules. In your experience with the Mo. Pac., is that the only instance where a senior helper who wanted the job was not set up when there was a carman vacancy?

A. That's the only one we have encountered.

Q. And you have been with the Mo. Pac. since 1925?

A. That's right.

[fol. 94] Q. Then if I understand your testimony correctly, there never has been an instance where a man once set up and who wanted carman seniority has not been given it after the completion of his four years.

A. No.

Q. Now, you have named three names who had completed work time, or their four year period or three year period

as it may be, and turned down carman seniority. They were Barnet, Guillott, or Gillot—those old Frenchmen would turn over in their graves.

A. We'll just call it Guillott.

Q. Guillott.

A. That's the pronunciation.

Q. And Johnson. Do you know offhand the position of those three men on the carman helper roster?

A. Well, sir, Barnett is the oldest man on the carman helper roster.

Q. Do you know who the next oldest is?

A. W. C. Johnson.

Q. Do you know who the third oldest is?

(Al. Tr. 29) A. No. I believe Ballard comes in there. I don't know whether he comes in ahead of Johnson or whether he comes in right under him.

Q. Well, I have here—again it's in the record, but I don't have its identification, but it's the seniority roster of carmen helpers as of January 1, 1957.

A. Well, that would be it.

Q. I hand you that to refresh your recollection and ask you where Guillott is on the list.

A. They are all three at the head of the list.

Q. Guillott is in third place?

A. No—yes, Guillott is in third place. Barnett, Johnson and Guillott.

[fol. 95] Q. In that order. And also it's in the record that Guillott finished his thousand and forty days on June the 10th, 1957, and that was the '57 roster I showed you, so that it is a fact that as of January 1, 1957 they were the top three men on the list, on the helpers' list?

A. They still are.

Q. And still are. What does that mean as a matter of practice, Mr. McMain, does it have any effect on how many days a month a man can get work, the position he is on the roster?

A. Well, it means this, a man that has seniority is the man that's working.

Q. And he is the last man to be laid off?

(Al. Tr. 30) A. Yes. In other words, if you are going to cut off all the helpers but three, those three top men would be the ones that would still work.

Q. And had they taken carman seniority, for example if Guillott had taken carman seniority in June of '57 he would have been the bottom man on the roster?

A. The youngest man on the carman seniority roster.

Q. All right. Now, I am not sure what your testimony was on those questions that Mr. Yost asked you about the applicability of rule 116 to permanent helpers. Do they or do they not have a right under 116 to bid to be set up as carmen—to be set up as temporary carmen when there is a vacancy for a temporary carman? Under Rule 116 do they or do they not have the right to be set up to bid on it?

A. Well, it doesn't spell it out here in this agreement, but that's the theory we worked on. That's in order to give the oldest men that preferred to be set up; he has that right to bid. But as long as there's men older than him on the helper roster—a man can be two years on that helper [fol. 96] roster and he can bid, but that isn't considered. But it doesn't spell out in Rule 116.

Q. Umnhmn. In other words, if he bids and an older man bids then——

A. The older man get it.

Q. He's out of luck?

Memorandum Opinion

(Filed in U.S. District Court, March 6, 1961)

These actions are brought pursuant to Section 9 of the Universal Military Training and Service Act (50 U.S.C. App., Sec. 459), and jurisdiction is established under subsection (d) of the Act.

The Act provides that a person who has left a position (other than temporary) in order to perform military service, and who receives a certificate of honorable discharge, makes application with his former employer within ninety days, and is still qualified for the position, shall be restored by such employer to the position or one of like seniority, status or pay. Section (c)(1) provides that in regard to seniority and other benefits, the returning employee shall be considered as having been on furlough or leave of absence. Subsection (c)(2) declares the sense of Congress to be that a person coming under the Act:

> "should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

The U. S. Attorney, upon application of the plaintiffs, appeared for the plaintiffs as their attorney, pursuant to subsection (d). Each of the plaintiffs seeks a seniority date as a carman mechanic which he would probably have received had his work as a set-up carman not been interrupted by military service. The cases were consolidated for trial, only differing in the location of employment and respective dates of the plaintiff's advancement to temporary carman, entry and discharge from military service. Each of the plaintiffs was originally employed and classified as a helper by the defendant, and each was upgraded to the position of temporary carman pursuant to collective bargaining agreements which created the temporary carman position during periods of shortage of skilled mechanics, originally to overcome shortages caused by war.

The agreement in effect at the time of the setting-up of plaintiffs, Tilton and McClearn, April 10, 1950, and August 23, 1951, respectively, and at the date of their induction into military service, October 12, 1950, and October 23, 1951, was a basic agreement, dated May, 1947. Under Rule 116 of the agreement one, without other special training, in order to qualify for carman classification and seniority, was required to have four years' work experience as a carman. No provision was made under the agreement for advancement of helpers, but the agreement was modified by an understanding between the parties that during a period of acute shortage of mechanics, helpers could be temporarily advanced upon approval of both labor and management, but that those advanced would have to meet the qualification requirement of the basic agreement before acquiring a carman seniority date.

In December, 1953, a collateral agreement was entered into providing for the upgrading of helpers "employed at the point where carmen are needed, who are qualified for advancement." The master mechanic or superintendent of shops and local committees were to jointly agree on the helpers to be advanced and selections were to be made first from helpers with two years or more of service. The 1953 agreement provided that an advanced helper would retain his helper seniority until completion of 1,040 days of service as carman, at which time he must make an election in writing either to go back to work as a helper or to take a carman seniority date and lose his helper seniority.

Plaintiff Beck was first set up October 12, 1951, but did not enter military service until March 1, 1955. Plaintiffs Tilton and McClearn, under their theory, could not, even had they been continuously employed, have met the 1,040 days' work requirement before the effective date of the 1953 agreement. The parties, thus, despite the devotion of many pages of their briefs to prior agreements, all agree that the 1953 agreement is controlling.

Each plaintiff upon completion of his military service returned and was restored to his set-up helper position with the same seniority and relative standing on the helper

roster as when he left. Each completed the work requirement of 1,040 days, at which time they elected in writing to take a carman seniority date, the dates being August 28, 1956, December 25, 1957, and December 5, 1957, for Tilton, McClearn and Beck, respectively.

Subsequently, the plaintiffs discussed the matter of seniority with the Bureau of Veterans Re-employment Rights, and this action was brought seeking to have their compliance of work requirements after return from military service effect a retroactive seniority date as carman such as they would probably have received had they not been called to military duty.

Plaintiffs find support for their claims primarily in the case of *Spearman* v. *Thompson*, 167 F. 2d 626, and in the case of *Diehl* v. *Lehigh Valley R. R. Co.* (per curiam 1955), 348 U.S. 960, reversing 211 F. 2d 95. The *Spearman* case involved persons in a similar position to the plaintiffs in this case. The record in that case differed from the instant case in that after the reinstatement of the plaintiffs as set-up carmen they were demoted to helper positions due to a reduction in force, while those helpers who had been advanced to carmen and accumulated three years of service as such without interruption of military duty were retained as carmen. It was stipulated that the appellants in the *Spearman* case were as fully qualified to perform the duties as set-up carmen upon their reinstatement as at the time of induction. It was further stipulated that it was the practice to require three years of actual service before the temporary position became permanent. The question, as the court in the *Spearman* case worded it, was whether appellants were entitled to have the time they spent with the armed forces applied toward seniority in the mechanic classification or merely as helpers. The court answered the question, l.c. 630:

> "If proficiency were the test, no Act of Congress could supply it and these three appellants would have been helpers when they were inducted and would be 'helpers' when they were reinstated."

The court found on the record that the test was not proficiency but a lapse of three years, and that the purpose of the three-year work requirement was merely to protect the seniority rights of others already classified as mechanics, who might then be on furlough.

In *Diehl, supra,* the plaintiff was set up to a temporary carman mechanic prior to his induction in the armed forces. After his induction the union and railroad entered into an agreement which provided that the seniority status of helpers promoted to temporary carmen would be determined after the end of the war emergency. After Diehl's discharge, reinstatement, and after working as a temporary carman more than 1,160 days, it was agreed that such helpers, upon completion of 1,160 days of experience as carmen, should elect within fifteen days whether to remain on the helper roster or be placed on the permanent carmen's roster. The plaintiff's position was that the veterans who were reinstated after service and met the 1,160 days' work requirement should be treated as if continuously employed and under 9(c)(2) given seniority ahead of those originally behind them on the temporary carmen roster whose work-day qualification was met at an earlier date because not interrupted by military duty. The defendant's position was that the veterans should be and were treated as on furlough or leave of absence under 9(c)(2).

The court found the provisions of 9(c)(1) and 9(c)(2) irreconcilable and concluded that the escalator position (*Oakley* v. *Louisville & N.R.Co.,* 338 U.S. 278; *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U.S. 275; *Aeronautical Industrial Dist. Lodge 727* v. *Campbell,* 159 F. 2d 252) to which veterans were entitled was that which was created by the collective bargaining agreement, and only those provisions which discriminated against veterans were invalid. Since the 1,160 days' work requirement treated Diehl precisely as other workmen, to place him ahead of workmen who first completed the work requirement would create a super-seniority for veterans. In its per curiam opinion the United States Supreme Court, citing *Oakley* v. *Louisville, etc., supra,* reversed upon the facts disclosed in the Third Circuit opinion.

Subsequent to the *Diehl* decision the Supreme Court was called upon to interpret Section 9(c) in *McKinney* v. *Missouri K.T.R.R. Co.*, 357 U.S. 265. The factual situation differed from *Spearman* and *Diehl*, in that it involved a reinstated veteran whose pre-service position was abolished, seeking to displace another employee, not with the company at the time of plaintiff's induction, who had been assigned to a position bulletined during plaintiff's military duty. The collective bargaining agreement gave persons of plaintiffs' group a preference over non-employees in the assignment to positions such as the one in question "based upon fitness and ability." The court found that the advancement sought was one within managerial choice and interpreted Section 9(c) in the following language, l. c. 271:

> "However, Sec. 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance, to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the armed forces but continued in his civilian employment."

The court gave petitioner leave to amend his complaint to show that in actual practice under the collective bargaining agreement the promotion would have been automatic.

Bassett v. *Texas & Pacific R. Co.*, 258 F. 2d 819, involved an apprentice carman's claim for seniority as a carman on a retroactive date selected as the time he would have served

his apprenticeship had it not been for service in the army. The court, citing *McKinney*, found that factors other than time served determined advancement and stated that only where the promotion is automatic can the veteran claim his right. Likewise, in *Poore* v. *L. & N.*, 235 F. 2d 687, on slightly different facts than are involved in the instant case, the court pointed out that where actual experience is an expressed requirement to advancement requiring technical and skilled employment, the Act does not mean to give effect to the mere passage of time.

A most relevant case in *Sularz* v. *Minn., St. P. & S. Ste. Marie R. R. Co.*, 259 F. 2d 122. In that case the veterans had been given, by virtue of an agreement between the defendant and the union, a retroactive seniority date as carmen and placed just above the person who had occupied the next lowest position on the helper roster, which is substantially the position plaintiff seeks in this case. The plaintiff Sularz was seeking to displace two persons, Brinda and Brown, who had not been on the helper roster at the point where plaintiff was employed at the time of his induction, but who had been transferred and assigned to his shop as temporary carman after plaintiff departed for service. Brown and Brinda completed the four-year work requirement before Sularz and were assigned seniority dates ahead of him.

Plaintiffs attempt to distinguish the facts of the Sularz case by pointing out that in that case the plaintiff was given the status sought by the plaintiffs in this action, and that the persons whom Sularz sought to displace were senior to him as helpers. Plaintiffs further point out that at the time Sularz was inducted he had not been upgraded and had no assurance of being upgraded. In regard to the latter suggested distinction, the court, both trial and appellate, determined the fact that Sularz would have been upgraded to temporary carman was not in doubt except as to time. The order of the advancement was dependent not only on seniority but also upon factors of experience and capability. Affirming the trial court, the Eighth Circuit, citing *McKinney*, supra, concluded that the veteran could

not claim status ahead of Brown and Brinda where his advancement to set-up carman was not automatic as to time. A distinction based upon the facts that in one case the promotion sought is from helper to upgraded helper and in this one from set-up helper to permanent carman, where the issue in both cases seeks a determination of whether the promotion was such as would be automatic under contract or practice or something less than automatic, is without merit.

It should be pointed out further that the issue as to whether service time could be applied to effect a retroactive seniority date upon completion of the work experienced as a set-up carman was abandoned in argument to the Court of Appeals, though determined by the trial court against Sularz upon finding that the work requirement fulfilled the function of insisting on skill and proficiency, creating a qualification distinct from a mere lapse of time. The fact that Sularz was, by agreement, given the position sought by plaintiffs in this action does not distinguish the issue presented to that trial court regarding the applicability of time in the armed forces to effect a seniority date as carman where skill, proficiency and experience are required.

The difference in the holdings is in the records presented. The record in the *Spearman* case was found to show that the work requirement was merely a delay in seniority to protect seniority of already qualified carmen. The *Diehl* per curiam decision is stated to be based upon the facts found by the trial court and relies on the *Oakley*, supra case. In *Oakley* the question before the court arose on a motion to dismiss on the ground that the plaintiff's action seeking a retroactive seniority date was brought more than one year after his reinstatement. The defendant claimed the veteran's statutory protection ceased after reinstatement for one year. The court held:

> "Expiration of one year did not terminate the veterans right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment; nor

did it open the door to discriminations against him, as a veteran."

The facts cited by the trial court in *Diehl* established that the first agreement regarding seniority status of the reinstated temporary mechanics was entered into several years after the facts of set-up, service, reinstatement and after Diehl had served 1,160 days in the position of temporary carman. The trial court found the agreement was not discriminatory since it treated all workmen alike. There was no finding as to whether the right to promotion was automatic before or after the agreement or what purpose the work requirement served. The effect of the reversal of the *Diehl* case, in view of the *Oakley* and *McKinney* cases, was to conclude that the agreement after the fact which made a distinction in treatment in essence depending upon continuous service, was discriminatory to the veterans.

The question before this court is whether the promotion to permanent carman was so automatic, under the bargaining agreement or actual practice under the agreements, as to entitle a veteran to the statutory protection of promotion advantages lost because of service interruption.

The record clearly indicates that under the agreement the promotion depended on more than a mere lapse of time. The system of classification into helpers and carmen required different qualifications for these distinct positions, the job description being at variance. The position of carman is one of much greater responsibility and skill. Previous to the agreements providing for the upgrading of helpers and other classifications the carmen employed met the qualifications before employment with defendant or gained the qualifications through an apprenticeship program. The provision for upgrading became necessary during the war periods in order to overcome the desperate shortage of trained mechanics. Seniority was not the only consideration under the agreement in determining which helpers would be set up, although in actual practice it carried greater weight than the agreement would require.

Most often where the senior man was not set up it was by virtue of amicable agreement that under the circumstances the advantages for the particular employee were in retaining the helper position.

After being set up a man was not considered a qualified carman, but only qualified by capacity to learn a carman's work. Plaintiff McClearn, in explaining why he accepted the set-up position, pointed out the purpose of the work requirement, saying: "Well, as a helper you are restricted in some work, where as a carman you gain knowledge of the job which you would like to get promoted to." The work requirement, unlike the record shown in the *Spearman* case, was not merely to protect the seniority of already qualified carmen, but was the agreed test of proficiency.

Promotion to permanent carmen was not only dependent upon a completion of the work requirement, but upon the continuing unavailability of qualified carmen, continued satisfactory work in the position, and election upon completion of the work requirement to take the advanced position and give up helper seniority. Only two cases were shown where the set-up man was downgraded—one for failure to qualify and do satisfactory work, and the other was again upgraded after negotiation with union representatives. There were many instances where selection by the employee was one to retain his helper seniority. Furthermore, the time of promotion was uncertain, depending upon lay-off due to illness, reductions in force, and again, the availability of already qualified carmen.

Plaintiffs point out as proof that the set-up carmen were qualified to do carmen's work to the fact that in actual practice they were not all given the wide training of an apprentice, but in fact some served in one capacity, such as car inspector, for most of the work period. This, however, points up the shortage of mechanics and the fact that the set-up carmen were not assigned to the usual wide range of duties because of lack of qualification, as seriously as it suggests proper qualification under customary practice.

Under the contract there was no automatic right to promotion. Viewing the circumstances in retrospect, in actual practices there was a high probability of advancement at some earlier date except for the interruption of military service, but high probability will not suffice. *McKinney* v. *Mo. K. T. R. R. Co.*, supra.

As has been stated, the work requirement was intended to be a period of on-the-job training to increase proficiency and skill through actual experience. More is involved than seniority status. The Act, assuring to veterans no loss of seniority, or promotional advantage, does not insure advancements dependent on factors other than mere lapse of time. Experience as required by the employment agreement cannot be provided by the statute, nor is it the statute's purpose to upset the settled status of employees who derive their standing in accordance with the seniority system agreed to.

The court will accordingly find for the defendant.

ROY W. HARPER,
U. S. District Judge.

Dated: March 6, 1961

PLAINTIFF'S MOTION FOR ADDITIONAL FINDINGS OF FACT

(Filed in U. S. District Court, April 12, 1961)

Plaintiffs herein respectfully move the Court to make the following additional findings of fact in these consolidated cases:

1. The record discloses no incident where, when a vacancy for upgraded helper occurred, such vacancy was not filled by the helper with greatest seniority who wanted the upgraded position.

2. Since the adoption of the original agreement in 1942, only two helpers who had been upgraded were set back to helper, before completing the requisite work requirement to acquire mechanic's seniority, for being unable to per-

form the duties of upgraded carman. One of these was subsequently reinstated as a set up helper after union intervention on his behalf.

3. During the period plaintiffs worked as helpers upgraded or "set up" to carmen, and during their absence in military service, qualified carmen continued to be unavailable to fill carmen's positions with defendant, and defendant obtained carmen for these positions by promoting to permanent carmen those helpers who had been upgraded, in the order they completed the work requirement and elected to be promoted.

4. Carmen's work was assigned to the upgraded helpers in order of date of upgrading, with the helper most recently upgraded being laid off or set back if carman's work was unavailable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed in U. S. District Court, May 3, 1961)

These consolidated cases came on for trial, and the Court, having considered the pleadings, the evidence, and the stipulation of the parties, and being fully advised in the premises, now finds the facts and states its conclusions of law.

Findings of Fact

The Court adopts the stipulation of facts filed herein by the parties and finds the facts stated therein to be true, and the memorandum opinion filed by the Court. In addition, the Court finds as follows:

1. The defendant is a corporation, maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court.

2. Prior to entering upon military service, each of the three plaintiffs was employed by the defendant in positions other than temporary, and left such positions in order to

perform military service. Upon completion of their military service, each of the plaintiffs received a certificate of honorable discharge and applied to the defendant for re-employment within 90 days after such discharge.

3. At the time plaintiffs left the defendant's employ to perform military service, each was classed as a carman helper and held seniority only as a carman helper, but each had been "set up" or temporarily advanced to the position of carman pursuant to certain collective bargaining agreements which permitted such temporary utilization of carman helpers as carman because of the shortage of qualified carmen. In their upgraded positions as carmen, the plaintiffs continued to hold seniority only as carman helpers and acquired no seniority or other rights as carmen.

4. Upon the completion of their military service and their application to defendant for re-employment, each of the plaintiffs was restored to his previous position as carman helper, with the same seniority date and the same relative standing on the helper's seniority roster as he had on entering military service. Each was also temporarily advanced to the position of carmen because of the continuing shortage of qualified carmen at the time they were re-employed by defendant.

5. Effective July 1, 1942, defendant entered into an agreement with the union representing carmen and carman helpers which permitted the temporary advancement of apprentices and of helpers to service as carmen as long as qualified carmen were not available to fill carmen's positions. This agreement also provided that helpers so advanced who accumulated three years of service in carmen's positions may acquire a carmen's seniority at the end of their three years of such service.

6. In May of 1947, the defendant and the carmen's union entered into an understanding which abrogated, as to any helpers threafter selected for advancement, the provision of the 1942 agreement which gave to the helpers who had accumulated three years of service as temporary carmen any right to acquire a carman's seniority. Any helpers selected for advancement after May, 1947, could qualify as carmen

and acquire a carman's seniority only as provided in Rule 116 of the Basic Collective Bargaining Agreement, which required a minimum of four years' experience in carmen's positions. By the time that any of the plaintiffs had been upgraded, the four-year requirement was strictly enforced at the points where they were working, and plaintiffs all understood when they were upgraded that four years of actual work in carmen's positions were required in order to qualify as carmen.

7. On December 7, 1953, a collateral agreement was entered into between the defendant and the carmen's union which completely superseded the 1942 agreement, and which established new criteria as to how an upgraded helper could acquire seniority as a carman. In substance, this agreement provided that an upgraded helper would retain his helper's seniority until he had completed a total of 1,040 days' actual work in a carman's position, at which time he was required to make an election in writing either to relinquish his seniority as a helper and take seniority as a carman as of that date, or retain his helper's seniority and go back to working as a helper.

8. Pursuant to the 1953 agreement, the defendant kept an actual record on each upgraded helper of the days worked in a carman's position, counting the days worked prior to the date of the agreement, as well as those worked after the agreement. When an employee had completed 1,040 days in a carman's position, the defendant notified him of that fact so that the employee could then make his election between a helper's seniority and wages or a carman's seniority and wages. If the employee chose a carman's seniority, he was placed at the bottom of the carman's seniority roster.

9. Under the 1953 agreement, as well as the 1942 agreement, the selection of helpers for temporary advancement to positions as carman was made jointly by the shop superintendent or master mechanic acting for the defendant and by the Local Committee acting for the union. The contract further provided that *selections* for advancement were to be made with due regard to seniority and qualifica-

tions for advancement. By "qualifications" the parties meant aptitude for learning the trade and skills of a carman; they did not mean to imply that a helper selected for temporary advancement was to be considered as a qualified carman when selected. As a matter of actual practice, the selection of helpers for upgrading was not always in strict order of seniority.

10. The 1,040 days' work requirement established by the agreement of December 7, 1953, and the four-year work requirement in Rule 116 of the Basic Agreements were intended by the parties thereto as a period of the on-the-job training for the purpose of increasing proficiency and skill through actual experience. The actual practice under these contracts, at least from the time any of these plaintiffs were first upgraded, was in accord with that intention, and upgraded helpers, including plaintiffs, were required to complete four years (prior to December 7, 1953) or 1,040 days (after December 7, 1953) of actual work in a carman's position before they were considered sufficiently skilled to qualify as carmen and acquire a carman's seniority.

11. Plantiffs Tilton and McClearn left for military service prior to December 7, 1953, agreement. At that time, neither one had met the four-year work requirement for promotion to carman, nor could they have met that requirement prior to December, 1953, even if they had been continuously employed. After their return from military service and after the December, 1953, agreement, they were given credit for all days they had worked in carman's positions before the date of that agreement.

12. Before leaving their positions for military service, Plaintiff Tilton had worked a total of 145 days, McClearn had worked a total of 21 days, and Beck had worked a total of 851 days as temporary carman. After their return and re-employment by the defendant, each plaintiff completed the 1,040 days' work requirement established by the 1953 agreement, counting the days worked before military service, as well as days worked after return from military service. Upon completion of the work requirement, each plaintiff elected in writing to relinquish his helper's seniority

and to take a carman's seniority. Thereupon the defendant accorded each plaintiff a seniority date as carman as of the date following completion of the 1,040 day work requirement.

12. The position of carman was one of much greater responsibility and required considerably more skill and experience than the position of carman helper. Prior to the shortages of qualified carman growing out of the war, a person became a qualified carman through four years of apprenticeship training in all phases of a carman's work. Except insofar as the upgrading agreements of 1942 and 1953 permitted carman helpers to be used for carmen's work, when qualified carmen were not available, carman helpers were restricted to the work described in Rule 118 of the Basic Agreements, Separate seniority lists were maintained and carmen helpers had no right to bid on vacancies in the man's classification.

13. Whether or not the plaintiffs or any of them, if they had not been in military service, would have worked as a temporary carman on every date that such work was available during that period, and whether they would have completed the 1,040 day work requirement before the next upgraded helper or by any given date is not certain, even though in retrospect it may be regarded as highly probable. Nor is it certain that upon completion of the work requirement at an earlier date each of the plaintiffs would have elected to relinquish their helper's seniority.

14. The plaintiffs and other carman helpers who were temporarily advanced to carman's positions under the 1953 or prior agreements had no guarantee, either by reason of the contracts or actual practices under the contracts, that they could ever complete the 1,040 day work requirement in order to qualify as a carman or acquire a carman's seniority. The completion of the work requirement and the date of completion depended on a number of variable factors not within the plaintiffs' control, among which were (1) lay-offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, and (3) continued satisfactory work by the carman helper in the upgraded position.

Conclusions Of Law

1. This Court has jurisdiction of these cases under the provisions of Section 9 (d) of the Universal Military Training and Service Act (50 U.S.C. App. Sec. 459).

2. The seniority rights of the plaintiffs are subject to non-discriminatory terms and conditions of collective bargaining agreements entered into between employer and employee representatives as provided in the Railway Labor Act. It is not the purpose of the Universal Military Training and Service Act to upset or supersede such terms and conditions or the seniority rights of employees which are determined by the seniority system thus agreed to.

3. In cases where returning veterans claim a right to an earlier seniority date in a different position on the ground that had they been continuously employed they would have been entitled to such earlier seniority date, the burden is upon them to show that under the terms and conditions of the agreements and practices thereunder, they would have acquired such earlier seniority date automatically upon the mere lapse of time or solely by reason of their seniority in the position held when they left for military service.

4. Under the terms and conditions of the agreements by which plaintiffs were permitted to work as temporarily advanced carman, there was no such right of automatic progression to permanent positions as carman.

5. The plaintiffs had not acquired any contractual rights to positions or to seniority as carman before they entered military service nor before the effective date of the December, 1953, agreement. Whatever rights they have to acquire seniority as carman is governed by the terms and conditions of that agreement.

6. Under the December, 1953, agreement, the plaintiffs could acquire no seniority rights as carman until (1) they had accumulated 1,040 days of actual work experience in carmen's positions, and (2) they elected in writing to relinquish their helper's seniority and to take a carman's seniority at the time they completed the 1,040 days' work requirement. The period of time when plaintiffs were on

leave of absence, in military service, or not working as carmen for any other reason, could not be counted as equivalent to the actual work experience in carmen's positions required by this agreement.

7. Even though it appears, in retrospect, that plaintiffs probably could have qualified for and would have elected to take a carman's seniority at an earlier date if they had been continuously employed, there is no certainty that they could have or would have done so at any give time, or that they would have acquired such seniority before any helper upgraded after they were. A showing of high probability of promotion to a better position does not meet the plaintiffs' burden of proving that such promotion was a matter of automatic progression.

8. Plaintiffs have not shown any violation by the defendant of their re-employment rights under Section 9 of the Universal Military Training and Service Act, and are, therefore, not entitled to any relief sought in these actions. These actions will, therefore, be dismissed upon the merits and judgment entered in favor of defendant.

ROY W. HARPER,
United States District Judge.

Dated: May 3, 1961

JUDGMENT

(Filed in U.S. District Court on May 3, 1961)

The above-entitled actions, consolidated for trial, having been tried before the Court, and the Court having filed its memorandum opinion and having entered its findings of fact and conclusions of law, finding and adjudging the issues generally in favor of the defendant, it is therefore

ORDERED, ADJUDGED, AND DECREED, that the plaintiffs shall not have any relief in these actions, and each action shall be, and is hereby, dismissed on the merits.

Dated May 3, 1961.

ROY W. HARPER,
United States District Judge.

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105 In the United States Court of Appeals for the Eighth Circuit

No. 16814

DONALD I. TILTON, APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

No. 16815

WILFRED L. BECK, JR., APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

No. 16816

GUY H. MCCLEARN, JR., APELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

Appeals from the United States District Court for the Eastern District of Missouri

Opinion August 17, 1962

Before VOGEL, BLACKMUN and RIDGE, Circuit Judges.

BLACKMUN, Circuit Judge.

These are separate actions instituted under § 9 of the Universal Military Training and Service Act, as amended,
106 50 U.S.C. App. § 459.[1] The three plaintiffs, employees of Missouri Pacific Railroad Company, were each promptly reinstated in railroad employment following satis-

[1] This Act, adopted in 1948, succeeded the Selective Training and Service Act of 1940, 54 Stat. 885.

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factory completion of a period of military service. By these suits, however, the plaintiffs, represented by government counsel as authorized by § 9(d) of the Act, now seek to compel the railroad to grant them the higher seniority which they allegedly would have attained had military service not interrupted their civilian employment.

The actions were consolidated for trial. The district court held that the plaintiffs were not entitled to the relief they sought. It entered judgment for the defendant in each case.

The facts of the three cases are parallel. For the most part they are stipulated and, in any event, the trial court's findings of fact are not challenged here.

World War II occasioned a shortage of qualified carmen. In an attempt to cope with this situation the railroad and the bargaining representative, Brotherhood Railroad Carmen of America, entered into a series of agreements.[2] The pertinent provisions of the applicable contract are set forth in the
107 margin.[3] In general summary, it (a) provides for the advancement, under certain conditions, of carmen helpers to temporary carman status; (b) specifies that selection of helpers so to be advanced shall be made as the master mechanic or shop superintendent and the union's local committee

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[2] The agreement important here is one effective August 1, 1953, and is collateral to the basic agreement between the railroad and the union. It is a successor to other agreements and in turn has since been supplemented. The parties concede its applicability.

[3] "Section 1.

"When the Carrier is unable to employ qualified carmen, truckmen, apprentices and helpers will be advanced to carmen as prescribed by this agreement.

"Advancements will be made in the following order and manner:

* * * * *

"(d) Should the need for carmen not be met by the advancement of truckmen and apprentices, helpers employed at the point where carmen are needed, who are qualified for advancement, will be so advanced. First choice to be made from helpers with two years or more of service as such. Master Mechanic or Superintendent of Shops and Local Committee will jointly agree on the helpers to be advanced. In the event there is disagreement on one or more helpers, * * * the names of the helpers not agreed on * * * will be referred to the General Chairman and Chief Mechanical Officer for prompt determination of the qualifications of the men involved. * * *

"Section 2.

"A list of all men advanced temporarily as carmen will be compiled and maintained. Men will be listed on the same in the order of their upgrading and the date of upgrading will be shown * * * The listing of the dates is

agree; (c) calls for a chronological listing of men so upgraded;
(d) denies that this dated listing connotes seniority;
108 (e) specifies that any reduction in the force shall be in reverse chronological order; (f) provides for a helper's retention of his helper's seniority during the period of his temporary upgrading; (g) recognizes carman qualification upon a helper's completion of 1040 days of carman service; (h) requires the employee then to select either a carman's status and seniority date as of that time (coupled with a relinquishment of his helper's seniority) or a return to a helper's status; and (i) preserves any temporary upgraded status of a helper who has entered military service.

The pertinent portions of § 9 of the Act are also reproduced in the margin.[4] They provide that one who has left his work with a private employer to enter military service and who

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not to be considered as a seniority date. When force reductions are made, the demotion from carman shall be in the reverse order of upgrading * * *

"Section 3. * * *

"(b) A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper.

"Section 4. * * *

"* * * helpers returning from the armed services, whose seniority has been protected as provided for by the laws of the United States and by agreement between the Organization and the Carrier will be governed by by the following:

"(c) Helpers upgraded to carmen will retain their position on the list of upgraded men if they enter the armed services.

"Section 5.

"Upgraded men will be permitted to make application for vacancies to positions as carmen and if there are no bids received from men who hold seniority as carmen, the upgraded men making application will be assigned based on their position on the upgraded list.

* * * * * * *"

[4] "(b) In the case of any such person who, in order to perform such training by such employer or his successor in interest to such position or to a position) in the employ of any employer and who * * * makes application for

makes timely application for reinstatement after the completion of his service shall, if still qualified, be restored
109 "to such position or to a position of like seniority, status and pay", shall be considered as having been on leave of absence during the service period, "shall be so restored without loss of seniority", and shall not be discharged from his position without cause for a year, and that it was the intent of Congress that he should be so restored "as to give him such status * * * as he would have enjoyed if he had continued in such employment continuously".

Each of the three plaintiffs here (a) was originally employed by the railroad as a carman helper, a non-temporary position; (b) was subsequently, pursuant to the bargaining agreement, upgraded to temporary carman while retaining his helper's seniority; (c) completed, before leaving for military service, only part of the 1040 day work period necessary for permanent advancement to carman; (d) returned from service to his employment as temporary carman; (e) was given the same rela-

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reemployment within ninety days after he is relieved from such training and service * * *

"(B) if such position was in the employ of a private employer, such person shall—

"(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; * * *

"(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

"(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. * * *"

"The 1940 Act contained provisions similar to those of § 9 (b) and (c) (1) but in the earlier Act those provisions were in § 8 (b) and (c). § 9(c)(2) is new in the present Act.)

tive position on the helpers' seniority roster which he had held before the interruption of his employment;[8] (f) then completed his 1040 days of work as temporary carman; (g) then elected to be a carman and to take carman's seniority; (h) received a carman's seniority date as of that time; and (i) thereupon relinquished his helper's seniority.

The specific progress dates for each plaintiff are:

110	Plaintiff Tilton	Plaintiff Beck	Plaintiff McClearn
1. Original employment as carman helper	7-13-49	5-12-50	5-24-50
2. Upgrading to temporary carman	4-10-50	10-12-51	8-23-51
3. Departure for military service	10-12-50	3- 1-55	10-23-51
4. Released from military service	12-23-51	3- 57	6- 53
5. Reemployment after service	1- 2-52	3-11-57	6-11-53
6. Completion of 1040 day work requirement and election to take carman seniority	8-27-56	12- 5-57	12-24-57
7. Seniority date on carmen's roster	8-28-56	12- 5-57	12-25-57

Twenty-nine non-veteran helpers in Tilton's case, six in Beck's, and five in McClearn's, began work as upgraded carmen after the particular plaintiff had been so upgraded. They continued to work in that capacity while the plaintiff was in military service. These men were able to complete the 1040 day work period and to elect carman seniority before the plaintiff did so. They accomplished this, however, after the plaintiff would have reached that goal had it not been for his absence in service, had he worked whenever carman work was at hand, and had carman status been selected by him in preference to the retention of helper's status with its more advanced seniority. These non-veterans are now ahead of the plaintiffs on the carmen's seniority roster. They enjoy over the plaintiffs those advantages, such as work preference, order of layoff, and order of recall, which that seniority dictates.

The plaintiffs complain that their seniority was adversely affected by their absence in military service in that these non-veteran employees, junior on the temporarily upgraded list, are now ahead of them on the permanent list. They claim
111 seniority status ahead of these non-veteran employees. They concede the existence of uncertainties, at the time of induction, as to ultimate qualification but they assert that

[8] In line with § 9(c)(2) of the Act and *McKinney* v. *Missouri-Kansas-Texas R.R.*, 1958, 357 U.S. 265, 270–1.

now that they have completed the work requirement, their desired priority in seniority status is no more than the situation which would have existed had their civilian employment not been interrupted by service. The plaintiffs' position here is exemplified by the following excerpt from their reply brief:

> Appellants do not contest the existence of various conditions or "uncertainties" surrounding the completion of their 1040 days actual work on the job. * * * What appellant [appellee?] fails to take into account, however, is that following their return from military service, the veterans' satisfactory performance of the work requirement and their meeting of any proficiency test, their election of promotion to journeyman, and the existence of vacancies and availability of work at all material times have, in their particular cases, *resolved or eliminated* all of these "uncertainties." There is indeed nothing "automatic" about their completion of the work requirement, but once they have completed it, they are entitled to have their seniority date established, *nunc pro tunc*, as of the date they would have completed had they not entered military service.

We feel that this posture on the part of the plaintiffs compels a conclusion that the judgments for the defendant were correct. A review of the decided cases, however, is in order.

The landmark is *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 1946, 328 U.S. 275. That case concerned a shipyard welder, the 1940 Act, and a bargaining agreement which provided that layoffs, where ability was fairly equal, should be controlled by length of service. That the welder's relative seniority was maintained while he was in military service is ap-
112 parent from the Second Circuit's opinion in the case at 154 F. 2d 785, 787. The employee, however, claimed, when he was a victim of a layoff made in the inverse order of seniority, that the 1940 Act protected him against layoffs over all non-veterans. The Supreme Court rejected this argument and held that the welder was entitled only to the maintenance of his relative seniority on the welders' roster. In so doing it

articulated its escalator principle in the following frequently quoted language, pp. 284–8 of 328 U.S.:

> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind. * * * He shall be "restored without loss of seniority" and be considered "as having been on furlough or leave of absence" during the period of his service for his country * * *. Thus he does not step back on the seniority escalator at the point he stepped off. eH steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * This legislation is to be liberally construed * * *. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. * * * He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. * * * No step-up or gain in priority can be fairly implied. * * * An employee on furlough or on leave of absence has a continuing relationship
> 113 with the employer * * *. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems * * *.

This interpretation was reaffirmed in *Trailmobile Co.* v. *Whirls*, 1947, 331 U.S. 40, 58, where it was said that the veteran is to be kept "in the same situation as if he had not gone to war but had remained continuously employed or had been 'on furlough or leave of absence'"; in *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 1949, 337 U.S. 521, 526; and in *Oakley* v.

Louisville & Nashville R.R., 1949, 338 U.S. 278, 283.* Its subsequent codification in 1948 now appears as § 9(c)(2) of the present Act, 50 U.S.C.A. App. § 459(c)(2). This is recognized by the Supreme Court in *McKinney* v. *Missouri-Kansas-Texas R.R.*, 1958, 357 U.S. 265, 271. The retention of the present plaintiffs in their same relative positions on the helpers' roster after their military service was clearly in compliance with this principle.

Fishgold was followed by a number of cases concerning the application of the escalator rule to the more complex situation of the employee who, having attained seniority at one level, was, when called into service, in the process of completing a work period required for promotion to a higher level. These cases produced the following results:

(a) Where the work period was not for the development of proficiency but was for another purpose, such as the protection of the seniority of others, the claimant's time in military service was to be counted toward the period's completion.
114 *Spearmon* v. *Thompson*, 8 Cir., 1948, 167 F. 2d 626, 630–1, cert. den. 335 U.S. 822; *Moe* v. *Eastern Air Lines*, 5 Cir., 1957, 246 F. 2d 215, 220–1, cert. den. 357 U.S. 936. *Cf. Borges* v. *Art Steel Co.*, 2 Cir., 1957, 246 F. 2d 735.

(b) The converse was also established, that, is where the work period was for the development of proficiency, it was not to be satisfied in whole or in part, by military service but, instead, was to be actually worked. *Altgens* v. *Associated Press*, 5 Cir., 1951, 188 F. 2d 727, 729; *Lipscomb* v. *Tennessee Coal, Iron & R. Co.*, 5 Cir., 1951, 189 F. 2d 708; *Addison* v. *Tennessee Coal, Iron & Railroad Co.*, 5 Cir., 1953, 204 F. 2d 340, 342; *Nevins* v. *Curtiss-Wright Corp.*, 6 Cir., 1949, 172 F. 2d 535; see *Spearmon* v. *Thompson*, supra, 8 Cir., 1948, p. 630 of 167 F. 2d, and *Moe* v. *Eastern Air Lines*, supra, p. 220 of 246 F. 2d.

The issue now before us, however, involves a still further refinement. If the work period is one genuinely directed toward proficiency and thus, by the last cited cases, is actually

* Although the issue is not present in the cases before us, it is to be noted that the Supreme Court's definition of seniority is a broad one and allows consideration of far more than mere length of service. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, supra; *Ford Motor Co.* v. *Huffman*, 1953, 345 U.S. 330.

to be served, and if it is completed following the claimant's return from service, is he entitled to a seniority date in the earned position only as of the date of actual completion or retroactively to some earlier date? The decided cases, although often cited in support of varying points of view, seem to provide these answers:

(a) Where it is found, or where the parties have stipulated or conceded, that, but for the period of military service, the work period would have been completed by a date certain or in a particular order among the upgraded employees, or, in other words, that the claimant would have been promoted automatically or by reason of mere passage of time, the claimant-veteran is entitled to seniority in his new position retroactively to that earlier date or in that order. *Diehl* v.
115 *Lehigh Valley R.R.*, 1955, 348 U.S. 960, reversing, per curiam, the Third Circuit's decision at 211 F. 2d 95, which in turn had affirmed the district court, 22 C.C.H. Labor Cases, Par. 67,375; *Mann* v. *Crowell-Collier Publishing Co.*, 6 Cir., 1956, 239 F.2d 699, 701; *Norris* v. *Robertshaw-Fulton Controls Co.*, E.D. Tenn., 1957, 150 F. Supp. 431, 432; *Bostick* v. *General Motors Corp.*, E.D. Mich., 1958, 161 F. Supp. 212, 216; *Nichols* v. *Southern Ry.*, E.D. Ky., 1961, 194 F. Supp. 148, 150. See *McKinney* v. *Missouri-Kansas-Texas R.R.*, supra, 1958, 357 U.S. 265, 273–4.

(b) On the other hand, if the claimant's promotion is not certain (as is the case where comparative ability, physical condition, age, employer's discretion, and the like, are factors) but is only probable—even highly probable—retroactive seniority is withheld. *McKinney* v. *Missouri-Kansas-Texas R.R.*, supra, pp. 271–2 of 357 U.S., where it was said:

> However, § 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and

advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

116 Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer. * * * Petitioner was not entitled to a group 1 position simply because in his absence it had been bulletined, and if he had then been employed he might have applied for it, and respondent might have found that he possessed the requisite fitness and ability.

Sularz v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, 8 Cir., 1958, 259 F. 2d 122, 124, where this court said:

> Since it is manifest that this is a strong or high probability situation, the trial court's conclusion finds full support in *McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, supra. That case authoritatively put to rest the question of whether returning veterans are entitled to retroactive promotions and seniority rights by holding that, to entitle the veteran to relief, the facts must show that the veteran would have been upgraded automatically, and that a strong probability of advancement will not suffice.[1]

Raulins v. *Memphis Union Station Co.*, 6 Cir., 1948, 168 F. 2d 466, 469; *Poore* v. *Louisville & Nashville R.R.*, 5 Cir., 1956, 235 F. 2d 687, 691; *Bassett* v. *Texas & Pacific Ry.*, 5 Cir., 1958,

[1] In *Sularz*, although the issues litigated concerned other non-veterans, the railroad eventually gave the claimant the retroactive seniority refused here. See *Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, D. Minn., 1956, 148 F. Supp. 83, 85, and p. 123 of 259 F. 2d, footnote 2. This, however, was pursuant to a later agreement with the union and did not rest upon the provisions of the Act. It thus affords no precedent for the present cases.

258 F. 2d 819; *Horton* v. *United States Steel Corp.*, 5 Cir., 1961, 286 F. 2d 710, 713; *Palmquist* v. *Buhl Sons Co.*, E.D. Mich., 1959, 179 F. Supp. 638.

These decisional results are not contested by the claimants here. Their argument, as already indicated, is that, 117 despite the uncertainties which concededly existed at the time of their entry into military service, their return to work and their completion of the work period dispelled those uncertainties and rendered them unfounded in fact. Therefore, it is said, since the work period has been completed and they have elected carman's seniority, it follows that, but for the military service, the plaintiffs would necessarily have achieved the higher status just ahead of their next junior upgraded helpers. Unfortunately, from the plaintiffs' viewpoint, there appears to be little or no effective supporting authority among the numerous cases interpreting the Act. We have found only two cases, *Morris* v. *Chesapeake & Ohio Ry.*, 7 Cir., 1948, 171 F. 2d 579, cert. den. 336 U.S. 967; and *Conner* v. *Pennsylvania R.R.*, D.C. Cir., 1949, 177 F. 2d 854, cert. den. 339 U.S. 919, where courts of appeals appear to have allowed later events to dispel antecedent uncertainties. The serious obstacle to the authoritativeness of these two cases is the great likelihood that they are effectively overruled by *McKinney* and by its requirement, for a contrary result, that the promotion in question be automatic and that, seemingly, it be automatic as a matter of foresight rather than of hindsight.

Plaintiffs do not rest their cases on *Morris* and *Conner* but, instead, urge that the Supreme Court's summary and per curiam reversal of the Third Circuit's decision in the *Diehl* case compels a conclusion in their favor here; that uncertainties did exist in *Diehl*; and that they were eliminated by performance.

We disagree. The summary reversal in *Diehl*, if the case is not inconsistent with *McKinney*, is perhaps to be explained by a conviction on the Court's part that there was no uncer- 118 tainty involved in the *Diehl* facts. This seems to be indicated by the Court's positive reliance on *Oakley* v. *Louisville & Nashville R.R.*, supra, 338 U.S. 278, where no uncertainty is ascertainable from the Court's opinion, and by

the stipulation [4] in *Diehl*, p. [illegible] of 211 F. 2d, that the claimant "would have completed" the work period on a given date if there had been no military service interruption. These stipulated words imply that the work completion was not dependent upon prior resolution of any contingency or uncertainty.

The present cases are otherwise. The trial court found specifically that by the bargaining agreement the initial choice of carmen helpers for upgrading was a matter of selection, not upon chronological seniority alone, but by the union and the railroad "with due regard to seniority and qualifications for advancement"; that by this the parties meant "aptitude for learning the trade and skills of a carman"; that "they did not mean to imply that a helper selected for temporary advancement was to be considered as a qualified carman when selected"; that in actual practice, "the selection of helpers for upgrading was not always in strict order of seniority"; [5] that the 1040 day requirement called for actual work for that period and was intended by the railroad and the union as an on-the-job training period "for the purpose of increasing proficiency in skill through actual experience"; that actual practice "was in accord with that intention"; that helpers' completion of the work period was required before they were "considered
119 sufficiently skilled to qualify as carmen and acquire a carman's seniority"; that "the position of carman was one of much greater responsibility and required considerably more skill and experience than the position of carman helper"; that whether the plaintiffs, if they had not been in military service, would have worked as temporary carmen on every date work was available and would have completed the work period before the next junior upgraded helper or by any given date "is not certain, even though in retrospect it may be regarded as highly probable"; that it was also uncertain whether the

[4] The parties in their briefs here both refer to a stipulation in *Diehl*. We find no clear reference to a stipulation in the opinions of either the Third Circuit or the district court. Inasmuch, however, as the plaintiffs' present counsel argued the *Diehl* case in the Supreme Court, we assume the existence of the stipulation. In any event, the trial court there appears to have found as a fact that the plaintiff "would have completed" the work period on a given date.

[5] This is illustrated by the dates of upgrading of plaintiffs Beck and McClearn set forth in the table, supra.

particular plaintiff would have elected at the earlier date to relinquish his helper's seniority; that the upgraded helpers had no guaranty, either by contract or by actual practice, that they could ever complete the work requirement; and that completion of the date thereof depended "on a number of variable factors not within the plaintiffs' control, among which were (1) lay-offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, and (3) continued satisfactory work by the carman helper in the upgraded position". Findings of this kind were not present in *Diehl*. We also note that each plaintiff's helper's seniority was at all times preserved, that only at the completion of the work period did the employee make his final choice between a currently dated carman seniority and the retention of an earlier achieved helper's seniority, and that the record discloses instances of voluntary retention of helper status and seniority following completion of the work period. All this, it seems to us, as it did to the district court, lacks the essentials of the automatic in the entire system of promotion from carman helper to full-fledged carman.

120 *McKinney* instructs us that each of these plaintiffs is not entitled to "perfect reproduction of the civilian employment that might have been his" if he had not been called to service; that there is much "that might have flowed from experience, effort, or change to which he cannot lay claim under the statute"; and that the Act "does not assure him that the past with all its possibilities of betterment will be recalled" or give him "a status that he could not have attained as of right". The situation here strikes us as clearly falling on that side of the factual line governed by *McKinney* rather than on the side governed by *Diehl*.

Of course, if *Diehl* and *McKinney* are in any way inconsistent in their holdings, we must necessarily follow *McKinney* as the latest pronouncement by the Supreme Court.

The plaintiffs would distinguish *McKinney* on the ground that the claimant there sought to establish only that his seniority rank alone gave him the right to promotion and that, having taken this stand, he had to prove that fact or lose his case. They further state that the Court's comments in *Mc-*

Kinney are manifestly inapplicable where a plaintiff's claim is based on seniority plus other elements and it is established as a fact that those other elements exist. This, they say, was the situation in *Diehl* and *Oakley*. Furthermore, all the uncertainties which had earlier existed had disappeared by the time of trial and thus had the veterans not been absent they would have been promoted ahead of the upgraders junior to them.

We think that *McKinney* is not so easily explained away. Accepting the trial court's findings as to contingencies and probabilities, which, as we have already noted, are not
121 challenged here, the reasoning of *McKinney* compels us to conclude that the entry of judgment for the defendant in each case was correct. Until the Supreme Court tells us otherwise, we necessarily follow what we feel is the holding of that case.

Affirmed.

122 In the United States Court of Appeals for the Eighth Circuit

SEPTEMBER TERM, 1961

No. 16814

DONALD I. TILTON, APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY

No. 16815

WILFRED L. BECK, JR., APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY

and

No. 16816

GUY H. MCCLEARN, JR., APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY

Judgment August 17, 1962

Appeals from the United States District Court for the Eastern District of Missouri

These causes came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and were argued by counsel.

On consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in these causes be, and the same is hereby affirmed.

AUGUST 17, 1962.

123 [Clerk's Certificate to foregoing transcript omitted in printing.]

OCTOBER TERM, 1962

No. —

DONALD I. TILTON, WILFRED L. BECK, JR., AND GUY H. MCCLEARN, JR., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD COMPANY

Order extending time in which to file petition for writ of certiorari—November 8, 1962

UPON CONSIDERATION of the application of the Solicitor General,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 14, 1962.

BYRON R. WHITE,
Associate Justice
of the Supreme Court of the United States.

Dated this 8th day of November, 1962.

125 Supreme Court of the United States

OCTOBER TERM, 1962

No. 664

DONALD I. TILTON, ET AL., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD COMPANY

Order allowing certiorari

February 18, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1963

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No.

DONALD I. TILTON, WILFRED L. BECK, JR., GUY H. McCLEARN, JR., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Donald I. Tilton, Wilfred L. Beck, Jr., and Guy H. McClearn, Jr.,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above consolidated cases on August 17, 1962.

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Eastern District of Missouri (App., *infra*, p. 18a) are not reported.

[1] The government acts on behalf of these individual claimants to veterans' reemployment rights by virtue of Section 9(d) of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459(d).

The opinion of the court of appeals (App., *infra*, p. 1a) is reported at 306 F. 2d 870.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 26a) was entered on August 17, 1962. By order dated November 8, 1962, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including December 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans reemployed by their former employers are entitled to be restored only to that status or seniority which it could be foreseen, at the time they went into the service, that they would be absolutely certain to achieve.

STATUTE INVOLVED

The pertinent provisions of Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as amended, 50 U.S.C. App. 459) are as follows:

* * * * *

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within 90 days after he is relieved from such training and service or from hospitalization continuing

after discharge for a period of not more than 1 year—

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in this case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with

the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the Armed Forces until the time of his restoration to such employment.

* * * * *

STATEMENT

Petitioners Tilton, Beck and McClearn were originally employed by respondent, the Missouri Pacific Railroad Company, as carmen helpers, a position of lesser status, responsibility and pay than that of journeyman carman mechanic. Under the applicable collective bargaining agreement, the seniority of helpers and journeyman carmen is separately computed. Since the Second World War there has been a shortage of qualified journeyman carmen, and to alleviate this shortage the Railroad and the Brotherhood of Railroad Carmen entered into an agreement permitting the "upgrading" of carmen helpers to "temporary carman" status. This agreement provides in substance that, if the Railroad's need for additional journeyman carmen cannot be filled by persons presently qualified as journeyman carmen, representatives of the Railroad and the Brotherhood may jointly se-

lect men from among the carmen helpers to be upgraded to temporary carman status. The agreement further stipulates that an upgraded helper shall automatically be considered as a qualified journeyman carman when he has completed 1040 days of service as temporary carman, and that he can acquire a seniority date as a carman after he has served the 1,040 days merely by making an election to that effect in writing.[3]

Petitioners were upgraded to temporary carman status under this agreement. They were, however, inducted into the armed forces before any of them could complete the 1040 days of service necessary to qualify them automatically as journeyman carmen. Upon their honorable discharge, they were reemployed by respondent as temporary carmen, the upgraded position. Petitioners thereafter completed the 1040-day work period necessary to qualify them as carmen, and each of them elected to become journeyman carmen and were so employed by the Railroad.

The Railroad, however, established petitioners' seniority as journeyman carmen as of the date each ac-

[3] The agreement provides, in pertinent part: "[Section 3.] (b) A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper" (App. 3a).

tually completed the work period. As a result, petitioners had seniority inferior to that of a number of temporary carmen who had been more recently upgraded but who—because they were not absent in the service of their country, as were petitioners—were able to complete the 1040-day service requirement before petitioners. On the ground that they were entitled under the Universal Military Training and Service Act to be treated as if they had continued in their employment during their military service, petitioners instituted these actions in the district court. They sought to compel the Railroad to accord them seniority as journeymen from the date they would have completed the service period and automatically qualified for advancements to carman but for their induction into the military. The district court dismissed petitioners' actions on the ground (App., *infra*, p. 24a) that:

> Even though it appears, in retrospect, that plaintiffs probably could have qualified for and would have elected to take a carman's seniority at an earlier date if they had been continuously employed, there is no certainty that they could have or would have done so at any given time, or that they would have acquired such seniority before any helper upgraded after they were.

The court of appeals affirmed, relying primarily on this Court's decision in *McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265. Reading that decision as requiring, in order for a veteran to be entitled to advancement in status, "that the promotion in question be automatic and that, seemingly, it be automatic as a matter of foresight rather than of hindsight"

(App., *infra*, p. 14a), the court concluded that the promotions at issue here did not meet that standard. It observed that they could be affected by such "variables" as lay-offs due to illness or reduction in force, the continuing unavailability of enough qualified carmen to fill carmen's positions, continued satisfactory work by petitioners in the upgraded position and petitioners' decisions as to whether or not to elect full carman status (App., *infra*, p. 16a). Accordingly, the court held, eventual promotion of petitioners to permanent carman status could not have been foreseen with absolute certainty, and hence they were not entitled under the statute to seniority in that position as of the time they would have been promoted but for their induction.

REASONS FOR GRANTING THE WRIT

The ruling of the court below—that returning veterans are not entitled to the status they would have achieved but for their military service unless it was predictable with absolute certainty when they left that they would have achieved such status—is in conflict with *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960, and other decisions of this Court. It misapplies the standards enunciated in *McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265, and is also in conflict with decisions of other courts of appeals. In view of these conflicts and the obvious importance of this question in the administration of remedial veterans' legislation, the decision should be reviewed by this Court.

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1. Section 9 of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, carries forward the reemployment provisions of earlier selective service acts which were enacted for the purpose of ensuring that a person inducted into the armed forces would not be penalized or disadvantaged in the pursuit of his civilian career, as a result of his absence. See, *e.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284; *McKinney* v. *Missouri-Kansas-Texas R.R.*, *supra*, 357 U.S. at 270. In keeping with this purpose, this Court has ruled repeatedly that, under the Act, the returning veteran is entitled to be restored to the position and status he would have attained as of right had he remained continuously in his civilian employment. *E.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 284–285; *Oakley* v. *Louisville & N.R. Co.*, 338 U.S. 278, 283. The Court has held, too, that the Act is to be liberally construed. *E.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285; *McKinney* v. *Missouri-Kansas-Texas R.R.*, *supra*, 357 U.S. at 270.

It is incontestible that petitioners will suffer a severe disadvantage solely as a result of their military service if their seniority as journeyman carmen is computed from the date they actually completed the 1040-day training period. Because of petitioners' absence in the armed forces, upgraded carmen helpers junior to them in the seniority roster were able to work in their stead; and, by completing the training period sooner, thereby to jump ahead of petitioners in seniority. As the court below recognized, that ad-

vance in seniority gave these nonveterans decided advantages over petitioners, "such as work preference, order of layoff, and order of recall" (App., *infra*, p. 7a). On the other hand, had petitioners not entered the service, they would have had a contractual right both to complete the training period prior to the other upgraded helpers and to be advanced automatically to journeyman status when they had done so.[3]

Petitioners are thus the very class of veterans the Act was most clearly designed to protect. In denying them that protection, the decision of the court below is in conflict not only with the principles laid down by the foregoing decisions of this Court but also with the precise holding of this Court in *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960, which the court below refused to follow (App., *infra*, pp. 14a, 16a-17a).

The *Diehl* case presents a situation almost identical to that involved here. As here, Diehl was a carman helper upgraded to temporary carman mechanic under an agreement entitling him to elect status as a permanent carman mechanic upon the completion of a set training period.[4] As here, there was no way of forecasting with absolute certainty at the time Diehl entered the service whether or precisely when he would complete the service requirement; presumably all of the "variables" cited by the court below in this case (see p. 7, *supra*) were applicable in Diehl's

[3] And since, as the evidence showed, temporary carmen's work was in fact available while petitioners were in the service, there is little doubt but that they would actually have attained the promotion in question (App., *infra*, pp. 6a, 18a–19a, 24a).

[4] *Diehl* v. *Lehigh Valley R. Co.*, 211 F. 2d 95, 97 (C.A. 3).

case. As here, Diehl completed his training period only upon returning from military service, was given seniority as of the date he actually completed the training, and sought seniority as of the date on which he would have completed his temporary training had he not entered the service. The district court entered judgment against the veteran and the court of appeals affirmed. This Court unanimously reversed *per curiam* "upon the facts disclosed in the opinion of the Court of Appeals," citing *Oakley* v. *Louisville & N. R. Co., supra.*

The *Diehl* decision squarely governs this case. It stands, we submit, for the proposition that a veteran who actually completes his training period after his honorable discharge and reemployment, and who had a contractual right to higher status upon completion of that period, is entitled to the higher status from the date he would have completed the training had he not entered the service. Nor does the *Diehl* decision leave any room for wholesale speculation as to unforeseeable fortuitous circumstances that might have intervened to prevent the veteran from achieving, or to delay his achievement of, the higher status; if he has a contractual right to the higher status, he is entitled to the protection of the Act. In refusing to follow the *Diehl* case, the court below plainly erred.

2. The court below departed from *Diehl* because, in its view, the later decision of this Court in *McKinney* v. *Missouri-Kansas-Texas R.R., supra,* changed the law by introducing the requirement "that the promotion in question be automatic * * * as a matter of foresight" (App., *infra,* p. 14a)—*i.e.*, that it be pre-

dictable beyond peradventure at the time the veteran entered the service. This interpretation of the *McKinney* case is, we submit, erroneous; indeed, it would largely read out of the statute the so-called "escalator" right (see *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284–285) that Congress intended to provide.

In the *McKinney* case, the promotion in question was to be announced or "bulletined" when it became available; those in McKinney's lower position were entitled to bid for it and would be given preference over nonemployees, "based upon fitness and ability * * *." McKinney was called into the service from his lower position, and during his absence two promotions became available, were announced and were filled by nonemployees. Upon his return, he claimed that under the Act, he should have been promoted to the higher position and given seniority therein as of the date of the first opening which occurred during his absence.

This Court rejected the veteran's contention, finding that the promotion in question "is not dependent simply on seniority" but is "dependent on fitness and ability and the exercise of a discriminating managerial choice" (357 U.S. at 272). The Court went on to point out (*ibid.*):

> The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

The Court concluded that, where management had reserved the discretion to have promotions depend "upon fitness and ability," the employee could scarcely be considered as entitled to a promotion "as of right."

It is clear from a reading of the Court's opinion in the *McKinney* case that it ruled against the veteran solely because of this reservation of managerial discretion in the promotion process—a circumstance not present in the instant case. The decision stands for the proposition, therefore—not that a lack of absolute certainty that an "automatic" promotion will take place deprives the veteran of the Act's protection—but that the dependence of a promotion on an affirmative exercise of managerial discretion vitiates its "automatic" character. That this is so is further demonstrated by the fact that the Court remanded the *McKinney* case to give the veteran an opportunity to prove (as he had argued) that, notwithstanding his employer's apparent reservation of discretion, in fact by custom and practice he, as the senior union bidder for the higher position, would necessarily have obtained it. And yet the same kinds of obvious "variables" were present there as here: for example, it could not be predicted with certainty when McKinney entered the service (1) that a higher position would become available, (2) that he would not already have lost his lower position because of unsatisfactory performance, or (3) that he would in any event elect to bid for the higher position. If the Court had believed that such circumstances could affect the "automatic" character of a promotion, there would have been no point in its remanding the case to the trial

court for evidence concerning custom and practice.

It is thus clear that, in requiring that the attainment of a genuinely automatic promotion be predictable with absolute certainty, the court below seriously misread this Court's decision in the *McKinney* case. And its reading would, we submit, render the "escalator" rights bestowed on veterans by the Act largely meaningless. It is difficult to imagine a case where, at the time the veteran entered the service, it could be predicted with absolute certainty that all of the conditions necessary to his attaining a promotion would later occur. The "variables" cited by the court below will be present in most cases—the possibility, for example, that the veteran might have been laid off or fired before the promotion became available, or that he would not accept a promotion to which he was automatically entitled. To these could be added any number of other "variables"—for example, that the higher position might be eliminated by the employer's going out of business or merging with another company (cf. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40). If the veteran's "escalator" right depends upon such wide-ranging speculation, it is an empty right indeed.

3. The decision below is also in conflict with a number of rulings of other courts of appeals, which have sustained the claims of veterans to "escalator" rights notwithstanding the fact that the attainment of the right in question was not absolutely predictable as of the time the veteran entered the service, being dependent upon the very same types of "variables" as those cited by the court below. Thus, in

Morris v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C.A. 7), the court recited the fact that the promotion in question depended upon (1) the occurrence of a vacancy, and (2) the individual's making a bid for the vacancy (171 F. 2d at 579). In *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C.A. D.C.), the court noted that the transfer in question depended upon (1) a need for additional personnel in the higher position, (2) an "election" by the individual for the transfer, and (3) the individual's being "in good standing" in his lower position (177 F. 2d at 857). In neither case was the existence of these "variables" held to affect the otherwise "automatic" character of the rights at issue. See also *Borges* v. *Art Steel Co.*, 246 F. 2d 735 (C.A. 2), and *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C.A. 6), where, although the courts did not spell out all of the prerequisites to the attainment of the rights in question, it is fairly inferable that, at the least, continued satisfactory performance on the part of the employee (one of the "variables" cited by the court below) was a necessary condition; nevertheless, the veterans were held entitled to their "escalator" rights.

The fact that these decisions were rendered before the *McKinney* decision of this Court does not, we submit, alter the situation. As we have noted, we do not read the *McKinney* case as having intended to change the law in this area; it merely held that where the attainment of a promotion depends upon the supreme imponderable of managerial discretion (a factor present in neither the present case, the *Diehl* case nor any of the above decisions of the courts of appeals),

it cannot be said to be sufficiently "automatic" to bring the "escalator" right of the veteran into play.

4. The decision below would adversely affect a very substantial number of veterans whom Congress intended to protect through the "escalator" reemployment rights guaranteed by the Act. The upgrading arrangement of the Railroad in this case is comparable to those in effect on many other railroads and in many other industries having hundreds of thousands of workers. With the continued draft of a young men into the armed forces, the problems presented in this case are bound to recur time and again. Moreover, the spread of automation magnifies the importance of seniority and gives the issue added importance for the future.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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DECEMBER 1962.

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APPENDIX

United States Court of Appeals for the Eighth Circuit

No. 16814

DONALD I. TILTON, APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

No. 16815

WILFRED L. BECK, JR., APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

No. 16816

GUY H. MCCLEARN, JR., APPELLANT

v.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

[August 17, 1962]

Before VOGEL, BLACKMUN and RIDGE, *Circuit Judges*

BLACKMUN, *Circuit Judge.*

These are separate actions instituted under § 9 of the Universal Military Training and Service Act, as

amended, 50 U.S.C. App. § 459.[1] The three plaintiffs, employees of Missouri Pacific Railroad Company, were each promptly reinstated in railroad employment following satisfactory completion of a period of military service. By these suits, however, the plaintiffs, represented by government counsel as authorized by § 9(d) of the Act, now seek to compel the railroad to grant them the higher seniority which they allegedly would have attained had military service not interrupted their civilian employment.

The actions were consolidated for trial. The district court held that the plaintiffs were not entitled to the relief they sought. It entered judgment for the defendant in each case.

The facts of the three cases are parallel. For the most part they are stipulated and, in any event, the trial court's findings of fact are not challenged here.

World War II occasioned a shortage of qualified carmen. In an attempt to cope with this situation the railroad and the bargaining representative, Brotherhood Railroad Carmen of America, entered into a series of agreements.[2] The pertinent provisions of the applicable contract are set forth in the margin.[3] In gen-

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[1] This Act, adopted in 1948, succeeded the Selective Training and Service Act of 1940, 54 Stat. 885.

[2] The agreement important here is one effective August 1, 1953, and is collateral to the basic agreement between the railroad and the union. It is a successor to other agreements and in turn has since been supplemented. The parties concede its applicability.

[3] SECTION 1.

When the Carrier is unable to employ qualified carmen, truckmen, apprentices and helpers will be advanced to carmen as prescribed by this agreement.

Advancements will be made in the following order and manner:

* * * * * * *

(d) Should the need for carmen not be met by the advance-

eral summary, it (a) provides for the advancement, under certain conditions, of carmen helpers to temporary carman status; (b) specifies that selection of helpers so to be advanced shall be made as the master mechanic or shop superintendent and the union's local committee agree; (c) calls for a chronological listing

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ment of truckmen and apprentices, helpers employed at the point where carmen are needed, who are qualified for advancement, will be so advanced. First choice to be made from helpers with two years or more of service as such. Master Mechanic or Superintendent of Shops and Local Committee will jointly agree on the helpers to be advanced. In the event there is disagreement on one or more helpers, * * * the names of the helpers not agreed on * * * will be referred to the General Chairman and Chief Mechanical Officer for prompt determination of the qualifications of the men involved. * * *

SECTION 2.

A list of all men advanced temporarily as carman will be compiled and maintained. Men will be listed on the same in the order of their upgrading and the date of upgrading will be shown. * * * The listing of the dates is not to be considered as a seniority date. When force reductions are made, the demotion from carman shall be in the reverse order of upgrading * * *

SECTION 3. * * *

(b) A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper.

SECTION 4. * * *

* * * helpers returning from the armed services, whose seniority has been protected as provided for by the laws of the

of men so upgraded; (d) denies that this dated listing connotes seniority; (e) specifies that any reduction in the force shall be in reverse chronological order; (f) provides for a helper's retention of his helper's seniority during the period of his temporary upgrading; (g) recognizes carman qualification upon a helper's completion of 1040 days of carman service; (h) requires the employee then to select either a carman's status and seniority date as of that time (coupled with a relinquishment of his helper's seniority) or a return to a helper's status; and (i) preserves any temporary upgraded status of a helper who has entered military service.

The pertinent portions of § 9 of the Act are also reproduced in the margin.* They provide that one who has left his work with a private employer to enter military service and who makes timely applica-

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United States and by agreement between the Organization and the Carrier will be governed by the following:

* * * * * * *

(c) Helpers upgraded to carmen will retain their position on the list of upgraded men if they enter the armed services.

SECTION 5.

Upgraded men will be permitted to make application for vacancies to positions as carmen and if there are no bids received from men who hold seniority as carmen, the upgraded men making application will be assigned based on their position on the upgraded list.

* * * * * * *

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who * * * makes application for reemployment within ninety days after he is relieved from such training and service * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to

tion for reinstatement after the completion of his service shall, if still qualified, be restored "to such position or to a position of like seniority, status and pay", shall be considered as having been on leave of absence during the service period; "shall be so restored without loss of seniority", and shall not be discharged from his position without cause for a year, and that it was the intent of Congress that he should be so restored "as to give him such status * * * as he would have enjoyed if he had continued in such employment continuously".

Each of the three plaintiffs here (a) was originally employed by the railroad as a carman helper, a non-temporary position; (b) was subsequently, pursuant to the bargaining agreement, upgraded to temporary

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such position or to a position of like seniority, status, and pay; * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. * * *

The 1940 Act contained provisions similar to those of § 9 (b) and (c)(1) but in the earlier Act those provisions were in § 8 (b) and (c). § 9(c)(2) is new in the present Act.

carman while retaining his helper's seniority; (c) completed, before leaving for military service, only part of the 1040 day work period necessary for permanent advancement to carman; (d) returned from service to his employment as temporary carman; (e) was given the same relative position on the helpers' seniority roster which he had held before the interruption of his employment,[5] (f) then completed his 1040 days of work as temporary carman; (g) then elected to be a carman and to take carman's seniority; (h) received a carman's seniority date as of that time; and (i) thereupon relinquished his helper's seniority.

The specific progress dates for each plaintiff are:

	Plaintiff Tilton	Plaintiff Beck	Plaintiff McClearn
1. Original employment as carman helper	7-13-49	5-12-50	5-24-50
2. Upgrading to temporary carman	4-10-50	10-12-51	8-23-51
3. Departure for military service	10-12-50	3- 1-55	10-23-51
4. Release from military service	12-23-51	3- 57	6- 53
5. Reemployment after service	1- 2-52	3-11-57	6-11-53
6. Completion of 1040 day work requirement and election to take carman seniority	8-27-56	12- 5-57	12-24-57
7. Seniority date on carmen's roster	8-28-56	12- 5-57	12-25-57

Twenty-nine non-veteran helpers in Tilton's case, six in Beck's, and five in McClearn's, began work as upgraded carmen after the particular plaintiff had been so upgraded. They continued to work in that capacity while the plaintiff was in military service. These men were able to complete the 1040 day work period and to elect carman seniority before the plaintiff did so. They accomplished this, however, after the plaintiff would have reached that goal had it not been for his absence in service, had he worked whenever carman work was at hand, and had carman status been selected by him in preference to the retention of helper's status with its more advanced seniority.

[5] In line with § 9(c)(2) of the Act and *McKinney* v. *Missouri-Kansas-Texas R.R.*, 1958, 357 U.S. 265, 270-1.

These non-veterans are now ahead of the plaintiffs on the carmen's seniority roster. They enjoy over the plaintiffs those advantages, such as work preference, order of layoff, and order of recall, which that seniority dictates.

The plaintiffs complain that their seniority was adversely affected by their absence in military service in that these non-veteran employees, junior on the temporarily upgraded list, are now ahead of them on the permanent list. They claim seniority status ahead of these non-veteran employees. They concede the existence of uncertainties, at the time of induction, as to ultimate qualifications but they assert that, now that they have completed the work requirement; their desired priority in seniority status is no more than the situation which would have existed had their civilian employment not been interrupted by service. The plaintiffs' position here is exemplified by the following excerpt from their reply brief:

> Appellants do not contest the existence of various conditions or "uncertainties" surrounding the completion of their 1040 days actual work on the job. * * * What appellant [appellee?] fails to take into account, however, is that following their return from military service, the veterans' satisfactory performance of the work requirement and their meeting of any proficiency test, their election of promotion to journeyman, and the existence of vacancies and availability of work at all material times have, in their particular cases, *resolved or eliminated* all of these "uncertainties." There is indeed nothing "automatic" about their completion of the work requirement, but once they have completed it, they are entitled to have their seniority date established, *nunc pro tunc,* as of the date they would have completed had they not entered military service.

We feel that this posture on the part of the plaintiffs compels a conclusion that the judgments for the defendant were correct. A review of the decided cases, however, is in order.

The landmark is *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 1946, 328 U.S. 275. That case concerned a shipyard welder, the 1940 Act, and a bargaining agreement which provided that layoffs, where ability was fairly equal, should be controlled by length of service. That the welder's relative seniority was maintained while he was in military service is apparent from the Second Circuit's opinion in the case at 154 F. 2d 785, 787. The employee, however, claimed, when he was a victim of a layoff made in the inverse order of seniority, that the 1940 Act protected him against layoffs over all non-veterans. The Supreme Court rejected this argument and held that the welder was entitled only to the maintenance of his relative seniority on the welders' roster. In so doing it articulated its escalator principle in the following frequently quoted language, pp. 284-8 of 328 U.S.:

> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind. * * * He shall be "restored without loss of seniority" and be considered "as having been on furlough or leave of absence" during the period of his service for his country * * *. Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * This legislation is to be liberally construed

> * * *. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. * * * He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. * * * No step-up or gain in priority can be fairly implied. * * * An employee on furlough or on leave of absence has a continuing relationship with the employer * * *. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems * * *.

This interpretation was reaffirmed in *Trailmobile Co.* v. *Whirls*, 1947, 331 U.S. 40, 58, where it was said that the veteran is to be kept "in the same situation as if he had not gone to war but had remained continuously employed or had been 'on furlough or leave of absence'"; in *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, 1949, 337 U.S. 521, 526; and in *Oakley* v. *Louisville & Nashville R.R.*, 1949, 338 U.S. 278, 283.* Its subsequent codification in 1948 now appears as § 9(c)(2) of the present Act, 50 U.S.C.A. App. § 459(c)(2). This is recognized by the Supreme Court in *McKinney* v. *Missouri-Kansas-Texas R.R.*, 1958, 357 U.S. 265, 271. The retention of the present

* Although the issue is not present in the cases before us, it is to be noted that the Supreme Court's definition of seniority is a broad one and allows consideration of far more than mere length of service. *Aeronautical Industrial Dist. Lodge 727* v. *Campbell*, supra; *Ford Motor Co.* v. *Huffman*, 1953, 345 U.S. 330.

plaintiffs in their same relative positions on the helpers' roster after their military service was clearly in compliance with this principle.

Fishgold was followed by a number of cases concerning the application of the escalator rule to the more complex situation of the employee who, having attained seniority at one level, was, when called into service, in the process of completing a work period required for promotion to a higher level. These cases produced the following results:

(a) Where the work period was not for the development of proficiency but was for another purpose, such as the protection of the seniority of others, the claimant's time in military service was to be counted toward the period's completion. *Spearmon* v. *Thompson,* 8 Cir., 1948, 167 F. 2d 626, 630–1, cert. den. 335 U.S. 822; *Moe* v. *Eastern Air Lines,* 5 Cir., 1957, 246 F. 2d 215, 220–1, cert. den. 357 U.S. 936. *Cf. Borges* v. *Art Steel Co.,* 2 Cir., 1957, 246 F. 2d 735.

(b) The converse was also established, that is, where the work period was for the development of proficiency, it was not to be satisfied, in whole or in part, by military service but, instead, was to be actually worked. *Altgens* v. *Associated Press,* 5 Cir., 1951, 188 F. 2d 727, 729; *Lipscomb* v. *Tennessee Coal, Iron & R. Co.,* 5 Cir., 1951, 189 F. 2d 708; *Addison* v. *Tennessee Coal, Iron & Railroad Co.,* 5 Cir., 1953, 204 F. 2d 340, 342; *Nevins* v. *Curtiss-Wright Corp.,* 6 Cir., 1949, 172 F. 2d 535; see *Spearmon* v. *Thompson,* supra, 8 Cir., 1948, p. 630 of 167 F. 2d, and *Moe* v. *Eastern Air Lines,* supra, p. 220 of 246 F. 2d.

The issue now before us, however, involves a still further refinement. If the work period is one genuinely directed toward proficiency and thus, by the last cited cases, is actually to be served, and if it is completed following the claimant's return from serv-

ice, is he entitled to a seniority date in the earned position only as of the date of actual completion or retroactively to some earlier date? The decided cases, although often cited in support of varying points of view, seem to provide these answers:

(a) Where it is found, or where the parties have stipulated or conceded, that, but for the period of military service, the work period would have been completed by a date certain or in a particular order among the upgraded employees, or, in other words, that the claimant would have been promoted automatically or by reason of mere passage of time, the claimant-veteran is entitled to seniority in his new position retroactively to that earlier date or in that order. *Diehl* v. *Lehigh Valley R.R.*, 1955, 348 U.S. 960, reversing, per curiam, the Third Circuit's decision at 211 F. 2d 95, which in turn had affirmed the district court, 22 C.C.H. Labor Cases, Par. 67, 375; *Mann* v. *Crowell-Collier Publishing Co.*, 6 Cir., 1956, 239 F. 2d 699, 701; *Norris* v. *Robertshaw-Fulton Controls Co.*, E.D. Tenn., 1957, 150 F. Supp. 431, 432; *Bostick* v. *General Motors Corp.*, E.D. Mich., 1958, 161 F. Supp. 212, 216; *Nichols* v. *Southern Ry.*, E.D. Ky., 1961, 194 F. Supp. 148, 150. See *McKinney* v. *Missouri-Kansas-Texas R.R.*, supra, 1958, 357 U.S. 265, 273–4.

(b) On the other hand, if the claimant's promotion is not certain (as is the case where comparative ability, physical condition, age, employer's discretion, and the like, are factors) but is only probable—even highly probable—retroactive seniority is withheld. *McKinney* v. *Missouri-Kansas-Texas R.R.*, supra, pp. 271–2 of 357 U.S., where it was said:

> However, § 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been

his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer. * * * Petitioner was not entitled to a group 1 position simply because in his absence it had been bulletined, and if he had then been employed he might have applied for it, and respondent might have found that he possessed the requisite fitness and ability.

Sularz v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, 8 Cir., 1958, 259 F. 2d 122, 124, where this court said:

Since it is manifest that this is a strong or high probability situation, the trial court's conclusion finds full support in *McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, supra. That case authoritatively put to rest the question of whether returning veterans are entitled to retroactive promotions and seniority rights by holding that, to entitle the veteran to relief,

> the facts must show that the veteran would have been upgraded automatically, and that a strong probability of advancement will not suffice.'

Raulins v. *Memphis Union Station Co.*, 6 Cir., 1948, 168 F. 2d 466, 469; *Poore* v. *Louisville & Nashville R.R.*, 5 Cir., 1956, 235 F. 2d 687, 691; *Bassett* v. *Texas & Pacific Ry.*, 5 Cir., 1958, 258 F. 2d 819; *Horton* v. *United States Steel Corp.*, 5 Cir., 1961, 286 F. 2d 710, 713; *Palmquist* v. *Buhl Sons Co.*, E.D. Mich., 1959, 179 F. Supp. 638.

These decisional results are not contested by the claimants here. Their argument, as already indicated, is that, despite the uncertainties which concededly existed at the time of their entry into military service, their return to work and their completion of the work period dispelled those uncertainties and rendered them unfounded in fact. Therefore, it is said, since the work period has been completed and they have elected carman's seniority, it follows that, but for the military service, the plaintiffs would necessarily have achieved the higher status just ahead of their next junior upgraded helpers. Unfortunately, from the plaintiffs' viewpoint, there appears to be little or no effective supporting authority among the numerous cases interpreting the Act. We have found only two cases, *Morris* v. *Chesapeake & Ohio Ry.*, 7 Cir. 1948, 171 F. 2d 579, cert. den. 336 U.S. 967; and *Conner* v. *Pennsylvania R.R.*, D.C. Cir. 1949, 177 F. 2d 854, cert.

---

[1] In *Sularz*, although the issues litigated concerned other non-veterans, the railroad eventually gave the claimant the retroactive seniority refused here. See *Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, D. Minn., 1956, 148 F. Supp. 83, 85, and p. 123 of 259 F. 2d, footnote 2. This, however, was pursuant to a later agreement with the union and did not rest upon the provisions of the Act. It thus affords no precedent for the present cases.

den. 339 U.S. 919, where courts of appeals appear to have allowed later events to dispel antecedent uncertainties. The serious obstacle to the authoritativeness of these two cases is the great likelihood that they are effectively overruled by *McKinney* and by its requirement, for a contrary result, that the promotion in question be automatic and that, seemingly, it be automatic as a matter of foresight rather than of hindsight.

Plaintiffs do not rest their cases on *Morris* and *Conner* but, instead, urge that the Supreme Court's summary and per curiam reversal of the Third Circuit's decision in the *Diehl* case compels a conclusion in their favor here; that uncertainties did exist in *Diehl;* and that they were eliminated by performance.

We disagree. The summary reversal in *Diehl,* if the case is not inconsistent with *McKinney,* is perhaps to be explained by a conviction on the Court's part that there was no uncertainty involved in the *Diehl* facts. This seems to be indicated by the Court's positive reliance on *Oakley* v. *Louisville & Nashville R.R.,* supra, 338 U.S. 278, where no uncertainty is ascertainable from the Court's opinion, and by the stipulation[8] in *Diehl,* p. 97 of 211 F. 2d, that the claimant "would have completed" the work period on a given date if there had been no military service interruption. These stipulated words imply that the work completion was not dependent upon prior resolution of any contingency or uncertainty.

---

[8] The parties in their briefs here both refer to a stipulation in *Diehl.* We find no clear reference to a stipulation in the opinions of either the Third Circuit or the district court. Inasmuch, however, as the plaintiffs' present counsel argued the *Diehl* case in the Supreme Court, we assume the existence of the stipulation. In any event, the trial court there appears to have found as a fact that the plaintiff "would have completed" the work period on a given date.

The present cases are otherwise. The trial court found specifically that by the bargaining agreement the initial choice of carmen helpers for upgrading was a matter of selection, not upon chronological seniority alone, but by the union and the railroad "with due regard to seniority and qualifications for advancement"; that by this the parties meant "aptitude for learning the trade and skills of a carman"; that "they did not mean to imply that a helper selected for temporary advancement was to be considered as a qualified carman when selected"; that in actual practice, "the selection of helpers for upgrading was not always in strict order of seniority";* that the 1040 day requirement called for actual work for that period and was intended by the railroad and the union as an on-the-job training period "for the purpose of increasing proficiency in skill through actual experience"; that actual practice "was in accord with that intention"; that helpers' completion of the work period was required before they were "considered sufficiently skilled to qualify as carmen and acquire a carman's seniority"; that "the position of carman was one of much greater responsibility and required considerably more skill and experience than the position of carman helper"; that whether the plaintiffs, if they had not been in military service, would have worked as temporary carmen on every date work was available and would have completed the work period before the next junior upgraded helper or by any given date, "is not certain, even though in retrospect it may be regarded as highly probable"; that it was also uncertain whether the particular plaintiff would have elected at the earlier date to relinquish his helper's seniority; that the

*This is illustrated by the dates of upgrading of plaintiffs Beck and McClearn set forth in the table, supra.

upgraded helpers had no guaranty, either by contract or by actual practice, that they could ever complete the work requirement; and that completion and the date thereof depended "on a number of variable factors not within the plaintiffs' control, among which were (1) lay-offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, and (3) continued satisfactory work by the carman helper in the upgraded position". Findings of this kind were not present in *Diehl*. We also note that each plaintiff's helper's seniority was at all times preserved, that only at the completion of the work period did the employee make his final choice between a currently dated carman seniority and the retention of an earlier achieved helper's seniority, and that the record discloses instances of voluntary retention of helper status and seniority following completion of the work period. All this, it seems to us, as it did to the district court, lacks the essentials of the automatic in the entire system of promotion from carman helper to full-fledged carman.

McKinney instructs us that each of these plaintiffs is not entitled to "perfect reproduction of the civilian employment that might have been his" if he had not been called to service; that there is much "that might have flowed from experience, effort, or change to which he cannot lay claim under the statute"; and that the Act "does not assure him that the past with all its possibilities of betterment will be recalled" or give him "a status that he could not have attained as of right". The situation here strikes us as clearly falling on that side of the factual line governed by *McKinney* rather than on the side governed by *Diehl*.

Of course, if *Diehl* and *McKinney* are in any way inconsistent in their holdings, we must necessarily

follow *McKinney* as the latest pronouncement by the Supreme Court.

The plaintiffs would distinguish *McKinney* on the ground that the claimant there sought to establish only that his seniority rank alone gave him the right to promotion and that, having taken this stand, he had to prove that fact or lose his case. They further state that the Court's comments in *McKinney* are manifestly inapplicable where a plaintiff's claim is based on seniority plus other elements and it is established as a fact that those other elements exist. This, they say, was the situation in *Diehl* and *Oakley*. Furthermore, all the uncertainties which had earlier existed had disappeared by the time of trial and thus had the veterans not been absent they would have been promoted ahead of the upgraders junior to them.

We think that *McKinney* is not so easily explained away. Accepting the trial court's findings as to contingencies and probabilities, which, as we have already noted, are not challenged here, the reasoning of *McKinney* compels us to conclude that the entry of judgment for the defendant in each case was correct. Until the Supreme Court tells us otherwise, we necessarily follow what we feel is the holding of that case.

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed in U.S. District Court, May 3, 1961]

These consolidated cases came on for trial, and the Court, having considered the pleadings, the evidence, and the stipulation of the parties, and being fully advised in the premises, now finds the facts and states its conclusions of law.

FINDINGS OF FACT

The Court adopts the stipulation of facts filed herein by the parties and finds the facts stated therein to be true, and the memorandum opinion filed by the Court. In addition, the Court finds as follows:

1. The defendant is a corporation, maintaining a place of business at St. Louis, Missouri, within the jurisdiction of this Court.

2. Prior to entering upon military service, each of the three plaintiffs was employed by the defendant in positions other than temporary, and left such positions in order to perform military service. Upon completion of their military service, each of the plaintiffs received a certificate of honorable discharge and applied to the defendant for re-employment within 90 days after such discharge.

3. At the time plaintiffs left the defendant's employ to perform military service, each was classed as a carman helper and held seniority only as a carman helper, but each had been "set up" or temporarily advanced to the position of carman pursuant to certain collective bargaining agreements which permitted such temporary utilization of carman helpers as carman

because of the shortage of qualified carmen. In their upgraded positions as carmen, the plaintiffs continued to hold seniority or other rights as carmen.

4. Upon the completion of their military service and their application to defendant for re-employment, each of the plaintiffs was restored to his previous position as carman helper, with the same seniority date and the same relative standing on the helper's seniority roster as he had on entering military service. Each was also temporarily advanced to the position of carmen because of the continuing shortage of qualified carmen at the time they were re-employed by defendant.

5. Effective July 1, 1942, defendant entered into an agreement with the union representing carmen and carman helpers which permitted the temporary advancement of apprentices and of helpers to service as carmen as long as qualified carmen were not available to fill carmen's positions. This agreement also provided that helpers so advanced who accumulated three years of service in carmen's positions may acquire a carmen's seniority at the end of their three years of such service.

6. In May of 1947, the defendant and the carmen's union entered into an understanding which abrogated, as to any helpers thereafter selected for advancement, the provision of the 1942 agreement which gave to the helpers who had accumulated three years of service as temporary carmen any right to acquire a carman's seniority. Any helpers selected for advancement after May, 1947, could qualify as carman and acquire a carman's seniority only as provided in Rule 116 of the Basic Collective Bargaining Agreement, which required a minimum of four years' experience in carmen's positions. By the time that any of the plaintiffs had been upgraded, the four-year requirement

was strictly enforced at the points where they were working, and plaintiffs all understood when they were upgraded that four years of actual work in carmen's positions were required in order to qualify as carmen.

7. On December 7, 1953, a collateral agreement was entered into between the defendant and the carmen's union which completely superseded the 1942 agreement, and which established new criteria as to how an upgraded helper could acquire seniority as a carman. In substance, this agreement provided that an upgraded helper would retain his helper's seniority until he had completed a total of 1,040 days' actual work in a carman's position, at which time he was required to make an election in writing either to relinquish his seniority as a helper and take seniority as a carman as of that date, or retain his helper's seniority and go back to working as a helper.

8. Pursuant to the 1953 agreement, the defendant kept an actual record on each upgraded helper of the days worked in a carman's position, counting the days worked prior to the date of the agreement, as well as those worked after the agreement. When an employee had completed 1,040 days in a carman's position, the defendant notified him of that fact so that the employee could then make his election between a helper's seniority and wages or a carman's seniority and wages. If the employee chose a carman's seniority, he was placed at the bottom of the carman's seniority roster.

9. Under the 1953 agreement, as well as the 1942 agreement, the selection of helpers for temporary advancement to positions as carman was made jointly by the shop superintendent or master mechanic acting for the defendant and by the Local Committee acting for the union. The contract further provided that

selections for advancement were to be made with due regard to seniority and qualifications for advancement. By "qualifications" the parties meant aptitude for learning the trade and skills of a carman; they did not mean to imply that a helper selected for temporary advancement was to be considered as a qualified carman when selected. As a matter of actual practice, the selection of helpers for upgrading was not always in strict order of seniority.

10. The 1,040 days' work requirement established by the agreement of December 7, 1953, and the four-year work requirement in Rule 116 of the Basic Agreements were intended by the parties thereto as a period of the on-the-job training for the purpose of increasing proficiency and skill through actual experience. The actual practice under these contracts, at least from the time any of these plaintiffs were first upgraded, was in accord with that intention, and upgraded helpers, including plaintiffs, were required to complete four years (prior to December 7, 1953) or 1,040 days (after December 7, 1953) of actual work in a carman's position before they were considered sufficiently skilled to qualify as carmen and acquire a carman's seniority.

11. Plaintiffs Tilton and McClearn left for military service prior to December 7, 1953, agreement. At that time, neither one had met the four-year work requirement for promotion to carman, nor could they have met that requirement prior to December, 1953, even if they had been continuously employed. After their return from military service and after the December, 1953, agreement, they were given credit for all days they had worked in carman's positions before the date of that agreement.

12. Before leaving their positions for military service, Plaintiff Tilton had worked a total of 145 days,

McClearn had worked a total of 21 days, and Beck had worked a total of 851 days as temporary carman. After their return and re-employment by the defendant, each plaintiff completed the 1,040 days work requirement established by the 1953 agreement, counting the days worked before military service, as well as days worked after return from military service. Upon completion of the work requirement, each plaintiff elected in writing to relinquish his helper's seniority and to take a carman's seniority. Thereupon the defendant accorded each plaintiff a seniority date as carman as of the date following completion of the 1,040 day work requirement.

13. The position of carman was one of much greater responsibility and required considerably more skill and experience than the position of carman helper. Prior to the shortages of qualified carmen growing out of the war, a person became a qualified carman through four years of apprenticeship training in all phases of a carman's work. Except insofar as the upgrading agreements of 1942 and 1953 permitted carman helpers to be used for carmen's work, when qualified carmen were not available, carman helpers were restricted to the work described in Rule 118 of the Basic Agreements. Separate seniority lists were maintained and carmen helpers had no right to bid on vacancies in the man's classification.

14. The plaintiffs and other carman helpers who were temporarily advanced to carman's positions under the 1953 or prior agreements had no guarantee, either by reason of the contracts or actual practices under the contracts, that they could ever complete the 1,040 day work requirement in order to qualify as a carman or acquire a carman's seniority. The completion of the work requirement and the date of completion depended on a number of variable fac-

tors not within the plaintiffs' control, among which were (1) lay-offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, and (3) continued satisfactory work by the carman helper in the upgraded position.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of these cases under the provisions of Section 9(d) of the Universal Military Training and Service Act (50 U.S.C. App. Sec. 459).

2. The seniority rights of the plaintiffs are subject to non-discriminatory terms and conditions of collective bargaining agreements entered into between employer and employee representatives as provided in the Railway Labor Act. It is not the purpose of the Universal Military Training and Service Act to upset or supersede such terms and conditions or the seniority rights of employees which are determined by the seniority system thus agreed to.

3. In cases where returning veterans claim a right to an earlier seniority date in a different position on the ground that had they been continuously employed they would have been entitled to such earlier seniority date, the burden is upon them to show that under the terms and conditions of the agreements and practices thereunder, they would have acquired such earlier seniority date automatically upon the mere lapse of time or solely by reason of their seniority in the position held when they left for military service.

4. Under the terms and conditions of the agreements by which plaintiffs were permitted to work as temporarily advanced carman, there was no such

right of automatic progression to permanent positions as carman.

5. The plaintiffs had not acquired any contractual rights to positions or to seniority as carman before they entered military service nor before the effective date of the December 1953, agreement. Whatever rights they have to acquire seniority as carman is governed by the terms and conditions of that agreement.

6. Under the December 1953, agreement, the plaintiffs could acquire no seniority rights as carman until (1) they had accumulated 1,040 days of actual work experience in carmen's positions, and (2) they elected in writing to relinquish their helper's seniority and to take a carman's seniority at the time they completed the 1,040 days' work requirement. The period of time when plaintiffs were on leave of absence, in military service, or not working as carmen for any other reason, could not be counted as equivalent to the actual work experience in carmen's positions required by this agreement.

7. Even though it appears, in retrospect, that plaintiffs probably could have qualified for and would have elected to take a carman's seniority at an earlier date if they had been continuously employed, there is no certainty that they could have or would have done so at any given time, or that they would have acquired such seniority before any helper upgraded after they were. A showing of high probability of promotion to a better position does not meet the plaintiffs' burden of proving that such promotion was a matter of automatic progression.

8. Plaintiffs have not shown any violation by the defendant of their re-employment rights under Section 9 of the Universal Military Training and Service Act, and are, therefore, not entitled to any relief

sought in these actions. These actions will, therefore, be dismissed upon the merits and judgment entered in favor of defendant.

ROY W. HARPER,
United States District Judge.

Dated: May 3, 1961.

JUDGMENT

United States Court of Appeals for the Eighth Circuit

(September Term, 1961)

No. 16814

DONALD I. TILTON, APPELLANT,

v.

MISSOURI PACIFIC RAILROAD COMPANY

No. 16815

WILFRED L. BECK, JR., APPELLANT,

v.

MISSOURI PACIFIC RAILROAD COMPANY

No. 16816

GUY H. MCCLEARN, JR., APPELLANT,

v.

MISSOURI PACIFIC RAILROAD COMPANY

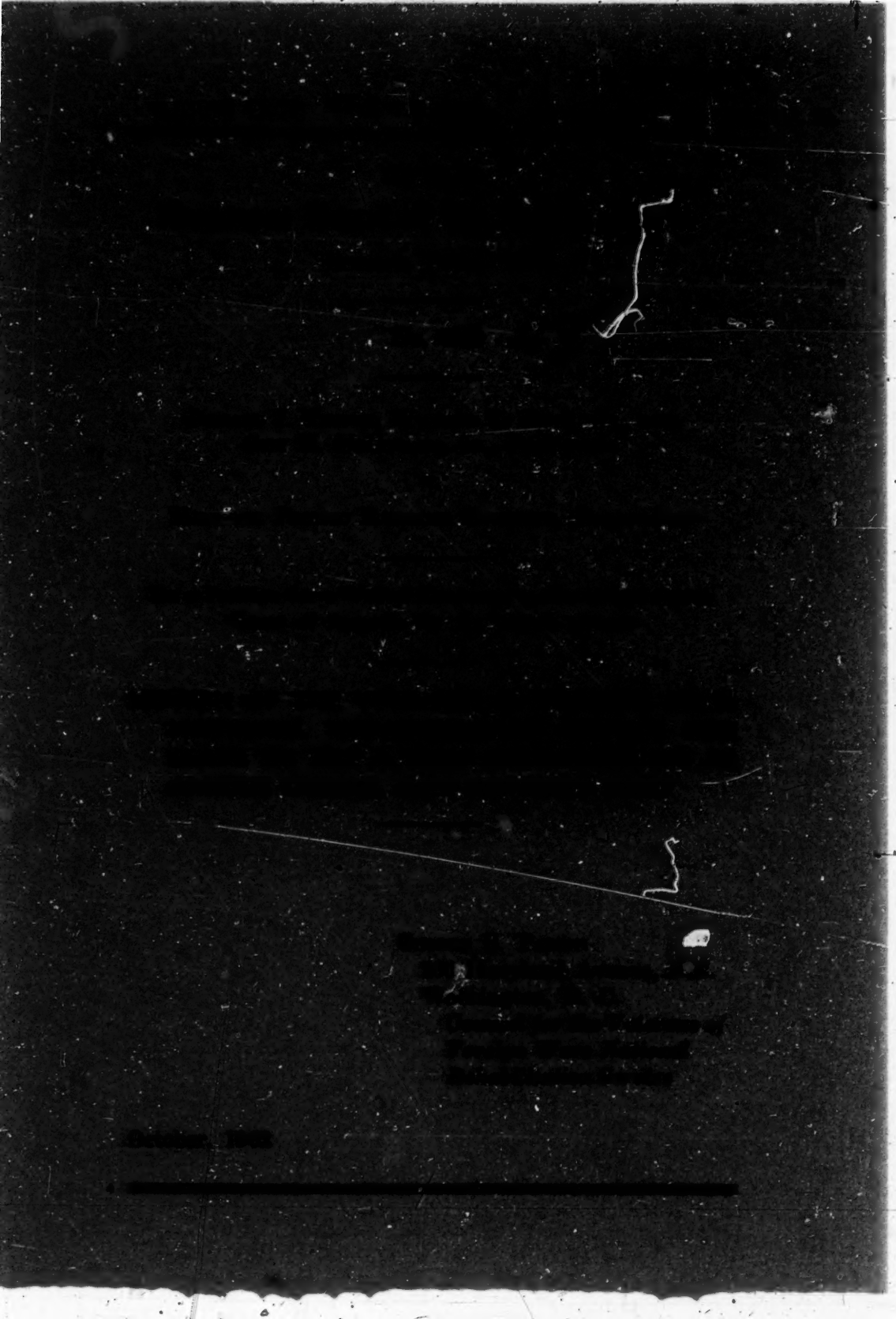
Appeals from the United States District Court for the Eastern District of Missouri.

These causes came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in these causes be, and the same is hereby, affirmed.

AUGUST 17, 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 664

DONALD I. TILTON, WILFRED L. BECK, JR., AND GUY H. MCCLEARN, JR., *Petitioners*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE VETERANS OF FOREIGN WARS NATIONAL REHABILITATION SERVICE FOR LEAVE TO FILE A BRIEF ON THE MERITS AS AMICUS CURIAE, AND ANNEXED BRIEF

The Veterans of Foreign Wars National Rehabilitation Service respectfully moves the Court for leave to file the annexed brief amicus curiae on the merits of the petition for a writ of certiorari by Tilton et al. The Veterans of Foreign Wars National Rehabilitation Service obtained the consent of the Department of Justice representing the petitioners. However, consent of the attorney for the

respondent Missouri Pacific Railroad Company was requested but refused.

I

The Veterans of Foreign Wars of the United States is an organization of overseas war veterans founded in 1899 and chartered by The Congress May 28, 1936. The National Rehabilitation Service of the Veterans of Foreign Wars assists veterans and their widows and orphans with their legal entitlements and restoration to the fullest physical, mental, social, vocational, and economic potential of which they are capable. Our 1,300,000 members participate in this effort at all levels of our organization. Many of our members and other veterans have been called to the colors twice and may proudly serve again. Inasmuch as employment is the key to rehabilitation our interest in this case is profound and continuing. As set forth, infra, The National Rehabilitation Service of The Veterans of Foreign Wars, acting on behalf of itself, our members and all veterans protested to the Bureau of Reemployment Rights of the Labor Department in behalf of Tilton et al. The National Rehabilitation Service of The Veterans of Foreign Wars did not participate in the proceedings in the court below only because it was unaware that such proceedings were in progress until it was too late to intervene therein.

II

The questions presented by the petition for certiorari in this case are of vital importance to the veterans of our Nation, our own members, the battlefield combat effectiveness of our soldiery and the economic well being of our country. The practical effect of the decision below is to penalize Tilton et al. for serving their country during the Korean Conflict. This decision impairs our efforts to rehabilitate veterans by restoration to former employment.

Worse, it spreads amongst veterans the feeling of betrayal by those for whom we fought. This was not the intent of The Congress or The Supreme Court in cases cited, infra.

III

WHEREFORE, The National Rehabilitation Service of the Veterans of Foreign Wars moves the Court for leave to file the brief annexed hereto on the merits of the questions raised by the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 664

DONALD I. TILTON, WILFRED L. BECK, JR., AND GUY H. MCCLEARN, JR., *Petitioners*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE VETERANS OF FOREIGN WARS NATIONAL REHABILITATION SERVICE AS AMICUS CURIAE

The Veterans of Foreign Wars National Rehabilitation Service submits this brief as amicus curiae in support of Tilton et al. to reverse a final judgment of the United States Court of Appeals for the Eighth Circuit entered August 17, 1962. That court had held that a Korean Conflict veteran, Tilton, and others had no reemployment rights under the provisions of the Universal Military Training and Service Act of 1951, 64 Stat. 614, as amended, 50 USC App. 459.

THE INTEREST OF THE VETERANS OF FOREIGN WARS REHABILITATION SERVICE

This petitioner agrees that the statement of facts, questions presented, and basis of jurisdiction are correct and are not fully repeated herein. This veteran organization, representing veterans of foreign wars has a continuing concern with the application of all laws effecting justice to veterans, their widows, and orphans. Veterans of four wars are members of our organization plus many from the fighting in Vietnam. Accordingly, we always seek effective rehabilitation for the ex-combatant in his readjustment to civilian life.

ARGUMENT

The combat effectiveness of the soldier is impaired when he worries about his job back home being taken by those who are not serving in uniform, or about the fact that he may have to surrender some of the elements of tenure which enable him to be restored to his gainful employment. The American soldier must compete on the battlefield against enemies whose position is acually enhanced economically and financially by service in their forces. The Congress recognized this problem (50 U.S.C. App., Sec. 459). Battlefield commanders have long realized that the fighting man's morale should not be shaken by jeopardizing his family, his home, or his job. This is the principal reason why we are here, i.e. to assure that the American combatant should not be disadvantaged when he must serve in the armed forces to defend the nation, including those remaining at home who have displaced him in his employent. Our people must be able to fight for our country without concern lest they be discriminated against for having performed this vitally necessary service in behalf of our Nation. The recent call-up of tens of thousands of persons from civilian employment over the Cuban crisis, the President's statement of the obvious

need for further increases in our conventional armed forces, evidences the plain fact that there is no foreseeable end to the need for us to maintain a large military establishment. In F.Y. 1963 650,000 Americans were discharged from the Armed Forces; in F.Y. 1964 the discharge of 600,000 is contemplated. Several thousand have been called to the colors twice. This transfer in the movement of large numbers of servicemen from civilian employment to the armed forces and back makes it manifestly urgent that we protect the veterans in their civilian employment as a major factor in the country's security. Indeed, our ability to respond to any Communist engendered crisis must be so facile that it does not tire or cause impatience that would result in an impetuous or frustrated decision to war by miscalculation. Accordingly, the less anxiety and anguish experienced in this important transfer from mufti to uniform and back again makes this case one of grave importance. We agree with Mr. Justice Frankfurter in *McKinney* v. *Mo., Kans., and Tex. R.R.*, 375 U.S. 265 (1958) when he stated "He is not to be disadvantaged for serving his country." We cannot, however, reconcile the obiter dicta in the rest of this case with this statement.

The issue in this case is whether Tilton, after having met the requirements for a promotion subsequent to his return from the military service, should have his seniority kept even on the escalator with those who remained in civilian employent of the respondent.

Tilton was originally employed by the respondent July 13, 1949. On April 10, 1950, he entered military service and was released December 23, 1951. On January 2, 1952, he returned to work for the respondent. He completed the required 1040 day "apprenticeship" August 27, 1956. August 28, 1956, Tilton was designated that date as his seniority date on the carman's roster. While Tilton was in military service, 29 non-veteran carhelpers accrued days

of credit toward their 1040 day work objective. Inasmuch as Tilton was in the military service, these previously junior non-veterans proceeded ahead of him on the carman's seniority roster. The escalator rule announced in the Diehl and Oakley cases has not been departed from in any other decision of this Court. The opinion in the Court of Appeals below cited a series of cases to establish an irrelevant "development of proficiency" rule e.g., *Altgens* v. *Associated Press*, 5 Cir., 1951, 188 F 2nd 727, 729.

Tilton actually performed the 1040 day work requirement *plus* his military time. Must he now forfeit the time during the Korean Conflict despite the fact that he has actually served more than the 1040 days requirement in the first place? If the Court has always held the veteran entitled to such seniority credit, despite the contrary decisions below, and in other Circuit Courts, it is apparent that the veteran is not asking for super seniority in this case but merely a telescoping of time. The reversal per curiam by the Supreme Court in *Diehl* v. *Lehigh Valley R.R.*, 1955 348 U.S. 960 requires this result. If he had not performed the 1040 days of apprenticeship and would be seeking to count days of military service as constituting apprenticeship days to make-up the 1040 days, a different question would be involved. Therefore, inasmuch as Tilton performed his 1040 days of apprenticeship, his seniority should be just as if the Korean Conflict had never happened or had merely delayed his completion of apprenticeship. To do otherwise would penalize him for having served during the Korean Conflict.

CONCLUSION

As amicus curiae the Veterans of Foreign Wars of the United States of America National Rehabilitation Service prays that the petition be granted, and that the decision

below be reversed, and petitioners' seniority be computed as if he had remained continuously in the respondent's employ.

Respectfully Submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

DONALD I. TILTON, WILFRED L. BECK, JR.,
GUY H. McCLEARN, JR.,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

BRIEF

Of Respondent in Opposition to
Petition for Certiorari.

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No. 664.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

DONALD I. TILTON, WILFRED L. BECK, JR.,
GUY H. McCLEARN, JR.,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Certiorari.

QUESTION PRESENTED.

In their petition for certiorari, the petitioners have presented a question which does not accurately reflect the issues decided by the lower Courts. The issue decided in the Court of Appeals and now presented to the Supreme Court is this:

Where the Collective Bargaining Agreement and actual practice thereunder require a period of on-the-job training which is intended to insure a minimum degree of proficiency and therefore is to be actually worked in order to qualify for promotion to a different position, does a veteran who completes such period of training and qualifies for promotion after his return from military service have the right to a seniority date in his new position as of the time he actually qualifies, or retroactively as of a time when he probably, but not automatically, would have qualified if he had not been in military service?

STATEMENT.

At the time plaintiffs left the defendant's employ to perform military service, each was classed as a carman helper and held seniority only as a carman helper, but each had been temporarily set up to the position of carman pursuant to certain agreements which permitted such temporary utilization of carman helpers as carmen because of the shortage of qualified carmen growing out of World War II. In their temporary position of carmen, they acquired no seniority rights as carmen (R. 98).

The position of carman was one of much greater responsibility and required considerably more skill and experience than the position of carman helper. Separate seniority lists were maintained and carman helpers had no right to bid on vacancies in the carman's classification. The Basic Collective Bargaining Agreement did not permit the use of carman helpers to do carman's work (R. 101).

On December 7, 1953, a new supplemental agreement was entered into, providing that if an upgraded carman helper accumulated a total of 1040 days of actual working experience in a carman's position, he was then considered as sufficiently skilled to qualify as a carman, and he was then required to elect whether he wished to relinquish his seniority as a carman helper and take seniority as a carman as of the date he so qualified, or retain his helper's seniority and go back to working as a helper (R. 99).

The plaintiffs had not accumulated the required 1040 days of actual experience in carmen's positions before they left for military service. Upon their return from military service, they were reinstated without loss of seniority and eventually were able to complete the 1040 days' work requirement. They thereupon elected to relinquish their helper's seniority and to take carman's senior-

ity. The defendant accorded each plaintiff a seniority date as carman as of the date each one qualified for and elected such position (R. 100).

The veterans alleged in their complaints and attempted to prove that if they had continued to work in the upgraded position of carmen for the period of their military service, they **would have** completed the 1040 days' work experience required by the 1953 agreement, and **would have** elected to take a carman's seniority before any other carman helper on the same seniority roster who had been upgraded after the plaintiffs were upgraded. In other words, plaintiffs attempted to show that by reason solely of their seniority and the passage of time, they would necessarily have been promoted ahead of any junior upgraded carman helpers. The District Court, however, found the facts against the plaintiffs. Contrary to plaintiffs' allegations, the Court found as follows:

> "Whether or not the plaintiffs or any of them, if they had not been in military service, would have worked as a temporary carman on every date that such work was available during that period, and whether they would have completed the 1040-day work requirement before the next upgraded helper or by any given date is not certain, even though in retrospect it may be regarded as highly probable. Nor is it certain that upon completion of the work requirement at an earlier date each of the plaintiffs would have elected to relinquish their helper's seniority.
>
> "The plaintiffs and other carman helpers who were temporarily advanced to carman's positions under the 1953 or prior agreements had no guarantee, either by reason of the contracts or actual practices under the contracts, that they could ever complete the 1040-day work requirement in order to qualify as a carman or acquire a carman's seniority. The completion of the

work requirement and the date of completion depended on a number of variable factors not within the plaintiffs' control, among which were (1) lay-offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, and (3) continued satisfactory work by the carman helper in the upgraded position" (R. 101).

The plaintiffs did not challenge the findings of the District Court in the Court of Appeals (see Pet. for Cert. page 2a) and do not challenge such findings here. The Courts below concluded on the basis of those findings, and on the authority of this Court's opinion in the **McKinney** case, that where claimants' promotion to a higher position would not have been automatic or certain had he continued to work during the period of his military service, and where such promotion ahead of junior upgraded men was not a matter of right, a retroactive seniority date in the higher position is not required by Section 9 of the Universal Military Training and Service Act.

ARGUMENT.

On the basis of the District Court's findings of fact, respondent respectfully submits that the decisions of the Courts below are clearly in accord with the decisions of the Supreme Court in the **Diehl** and the **McKinney** cases.

The Diehl Case Distinguished.

In the **Diehl** case, as indicated by the Court of Appeals' opinion (211 F. 2d 95), it was regarded as an established fact that Diehl **would have** completed 1160 days of service in a carman's position on June 1, 1946, ahead of four other carman helpers, if he had not been in military service. There was no question of fact for the Court to decide. The Supreme Court's per curiam reversal of the judgment against Diehl supplied no reason for its decision other than the following:

> "**Upon the facts disclosed** in the opinion of the Court of Appeals for the Third Circuit, the applicable Acts of Congress and the opinion of this Court in **Oakley v. L&N**, 338 U. S. 278, the judgment of the Court of Appeals is reversed." 348 U. S. 960, March 14, 1955. (Emphasis added.)

The reference to the **Oakley** case is the only guide furnished by the Court as to the reasons for reversing the Court of Appeals' decision.

The opinion of the Court in the **Oakley** case, and the companion case of **Haynes v. CNO&TP**, reveals that each of the complainants had alleged that if they had not been absent in military service, they **would have** acquired a certain seniority date earlier than the seniority date they were given upon their re-employment. The District Court and the Court of Appeals held that the complaints failed to state a cause of action. Therefore, from the factual standpoint, those cases were considered by the Supreme Court only upon the facts alleged in the complaints. (See Footnotes 2 and 3, 338 U. S., l. c. 280-281, 94 L. Ed., l. c. 90.)

The only issue decided by the Supreme Court in the **Oakley** and **Haynes** cases was whether or not the complaints were barred by the expiration of one year after return from military service. The Court held:

> "We hold that the expiration of the year did not terminate the veteran's right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment."

The Court went on to define the veterans' seniority rights as follows:

> "He therefore assumes, upon his re-employment, the seniority he **would have had** if he had remained in his civilian employment." (Emphasis added.) 338 U. S., l. c. 284, 94 L. Ed., l. c. 92.

It is thus apparent that the seniority which the veterans **would have had** if they had remained continuously in their civilian employment was not a factual issue either in the **Oakley-Haynes** cases or in the **Diehl** case. The decisions in those cases were therefore predicated on the undisputed fact that plaintiffs would necessarily have been promoted to the higher position on a certain date if they had not been absent in military service.

The factual situation in the present cases is quite the contrary. In these cases, the defendant proved to the satisfaction of the District Court that the plaintiffs would not necessarily have been promoted ahead of any junior carman helpers, and that there was no way for the Court to determine what their seniority relative to other promoted carmen would have been had they remained continuously in their employment during their period of military service. The Court therefore concluded as follows:

> "In cases where returning veterans claim a right to an earlier seniority date in a different position on the ground that had they been continuously employed

they would have been entitled to such earlier seniority date, the burden is upon them to show that under the terms and conditions of the agreements and practices thereunder, they would have acquired such earlier seniority date automatically upon the mere lapse of time or solely by reason of their seniority in the position held when they left for military service" (R. 102).

"Even though it appears, in retrospect, that plaintiffs probably could have qualified and would have elected to take a carman's seniority at an earlier date if they had been continuously employed, **there is no certainty that they could have or would have done so at any given time, or that they would have acquired such seniority before any helper upgraded after they were.** A showing of high probability of promotion to a better position does not meet the plaintiffs' burden of proving that such promotion was a matter of automatic progression" (R. 103). (Emphasis supplied.)

Since the Court was unable to find from the evidence presented by the plaintiffs that they would necessarily have qualified for promotion and would have elected such promotion ahead of any junior upgraded carman helper, the Court could not hold that the plaintiffs had an automatic right to an earlier seniority date than any such carman helper. This uncertainty as to when plaintiffs would have been promoted had they remained continuously employed distinguishes the case from the factual situation in the **Diehl** and in the **Oakley-Haynes** cases.

There is one other factual distinction between this case and the **Diehl** case which should be pointed out. In the **Diehl** case, the agreement concerning the seniority status of the upgraded carman helpers was not made until he and the others had already qualified as carmen. The retroactive application of the agreement resulted in a discrimination against Diehl solely because he had been absent in

military service, because it was agreed that had he remained continuously employed he would have acquired carman's seniority ahead of the other carman helpers who had been junior to him.

In the present case, however, the agreement which gives rise to plaintiffs' claim, and from which their rights to acquire carman's seniority is derived, was made in 1953, long before any of the plaintiffs became qualified or acquired any right under the agreement to elect a carman's seniority. There is no discrimination against veterans as such in the application of this agreement. It created rights for veterans and non-veterans alike which had not existed before the agreement, rights to be promoted to a higher classification upon meeting the qualifications for such promotion. Delay in meeting the qualifications, whatever the reason, works the same way on non-veterans as on veterans.

The effect of a decision in favor of the plaintiffs in this case would not be confined to these plaintiffs and to the men whom they would run around on the seniority list. Such a decision would affect the seniority of hundreds, perhaps thousands, of carmen in similar situations on the nation's railroads. It could also affect the seniority of persons in many other industries, whose promotion to higher positions also depended on the completion of training courses either on or off-the-job. It would thus greatly disturb the existing seniority rights of persons who are not parties to these proceedings and whose rights would be adversely affected without any chance to be heard.

The McKinney Case.

Based upon the findings of the District Court, the holdings of the District Court and of the Court of Appeals were clearly in accord with the decision and the principles which were established by the **McKinney** case. Justice Frankfurter, speaking for the Court, stated in his opinion:

"However, Sec. 9 (c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. **Much there is that might have flowed from experience**, effort, or chance **to which he cannot lay claim under the statute.** Section 9 (c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and **advancements in status that would necessarily have occurred** simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained **as of right, within the system of his employment**, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

"Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than he formerly held when promotion to such a position depends, **not simply on seniority or some other form of automatic progression**, but on the exercise of discretion on the part of the employer." 357 U. S. 265, l. c. 271, 2 L. Ed. 2d 1310. (Emphasis supplied.)

While the uncertainty or the lack of an automatic right to promotion in the **McKinney** case grew out of the employer's right to determine the fitness of the employee for the promotion, the principles of that case are clearly applicable in the instant case where the uncertainty grows out of other factors. The order in which upgraded men were placed on the carman's seniority roster was not determined by their seniority as helpers nor by the order in which they had been upgraded. Rather, placement on the carman's seniority roster was determined solely by the

order in which the upgraded men completed the required 1040 days of work experience and elected to take a carman's seniority. The elapsed time between their date of upgrading and their ultimate qualification for seniority as a carman varied with the individual depending on several variable factors. There was no right under the system established by the Collective Bargaining Agreements to be automatically promoted ahead of a junior helper or a junior upgraded man.

Since the District Court was not able to find from the evidence that the plaintiffs would have completed their training period and would have been entitled as of right to promotion by any given date or ahead of any junior upgraded man, the principles established by the **McKinney** case required a conclusion that plaintiffs are not entitled to a retroactive promotion.

Court of Appeals Cases.

The decision by the Court of Appeals was in accord with several decisions rendered by the first, fourth, fifth, sixth, seventh and eighth circuits, both before and after the **McKinney** decision.

Jefferson v. ACL, 303 F. 2d 522 (C. A. 5, 1962);
Poor v. L&N, 235 F. 2d 687 (C. A. 5, 1956);
Sularz v. MStP&SS, 259 F. 2d 122 (C. A. 8, 1958);
Bostian v. Seaboard Air Line, 211 F. 2d 867 (C. A. 4, 1954);
Gregory v. L&N, 92 F. Supp. 770, Affd. Per Cur. 191 F. 2d 856 (C. A. 6, 1951), Cert. Den. 343 U. S. 903;
Raulins v. Memphis Union Station, 168 F. 2d 466 (C. A. 6, 1948);
B&M v. David, 167 F. 2d 722 (C. A. 1, 1948);
Hewitt v. System Federation, 161 F. 2d 545 (C. A. 7, 1947).

The Court of Appeals cases cited by the petitioners in support of their position were decided long before the **McKinney** decision and, insofar as they are in conflict therewith, they have been overruled.

CONCLUSION.

These cases presented only a factual issue as to whether or not plaintiffs **would have** necessarily been promoted to carmen before any junior upgraded man, if they had been continuously employed. The District Court found in the negative and its findings have not been challenged. On the basis of its findings, the application of the principles announced in the **McKinney** case compels a conclusion that plaintiffs were not entitled to the relief they sought. The decision of the Court of Appeals was clearly correct as a matter of law, and the petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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Affidavit of Service.

State of Missouri, }
City of St. Louis, } ss.

I, R. W. Yost, of counsel on the foregoing brief, having been first duly sworn on my oath, state that copies of the foregoing brief in opposition to petition for certiorari have

been served upon Archibald Cox, Solicitor General of the United States, Attorney of Record for Petitioners, by depositing same in a United States mail box, first-class airmail, postage prepaid, addressed to him at the Department of Justice, Washington 25, D. C., on this 9th day of January; 1963.

(SIGNED) R. W. YOST

R. W. Yost,
Of Counsel for Respondent Missouri Pacific Railroad Company.

Subscribed and Sworn to before me this 9th day of January, 1963.

(Signed) R. C. MASON

Notary Public.

My Commission Expires Sept. 28, 1964

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 49

DONALD I. TILTON, WILFRED L. BECK, JR., AND GUY H. McCLEARN, JR., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD COMPANY

No. 53

ROBERT C. BROOKS, PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

1. *No. 49.* The findings of fact and conclusions of law of the United States District Court for the Eastern District of Missouri (Tilt. R. 97)[1] are not re-

[1] "Tilt. R." refers to the transcript of record in No. 49, *Tilton, et al.* v. *Missouri Pacific Railroad Company*; "B.R." refers to the transcript of record in No. 53, *Brooks* v. *Missouri Pacific Railroad Company*.

ported. The opinion of the Court of Appeals (Tilt. R. 105) is reported at 306 F. 2d 870.

2. *No. 53.* The opinion of the United States District Court for the Eastern District of Arkansas (B.R. 68) is not reported. The opinion of the Court of Appeals (B.R. 84) is reported at 308 F. 2d 531.

JURISDICTION

The judgment of the court of appeals in No. 49 (Tilt. R. 119) was entered on August 17, 1962. By order dated November 8, 1962 (Tilt. R. 120), Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including December 14, 1963. The petition for a writ of certiorari was filed on December 14, 1962, and was granted on February 18, 1963 (Tilt. R. 121).

The judgment of the court of appeals in No. 53 (B.R. 90) was entered on October 11, 1962. The petition for a writ of certiorari was filed on January 9, 1963, and was granted on February 18, 1963 (B.R. 91).

The jurisdiction of this Court in both cases rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as amended, 50 U.S.C. App. 459) are as follows:

* * * * *

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2)

makes application for reemployment within 90 days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than 1 year—

* * * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or

other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within 1 year after such restoration.

(2) It is declared to be the sense of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner so as to give him such status as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

QUESTION PRESENTED

Whether, upon completion of training periods of fixed duration, veterans are entitled, under the Universal Military Training and Service Act, to be assigned seniority dates as journeymen based upon the date when they would have completed their training periods and obtained journeyman seniority had they remained continuously in their railroad employment during the duration of their military service.

STATEMENT

The four petitioners are veterans re-employed by the respondent Missouri Pacific Railroad Company. At the time of their induction into the military service, each was engaged in a 1040-day work program leading to eventual advancement from helper or apprentice to full journeyman status. Upon completion

of the program after their return from service, each was duly accorded journeyman status by the Railroad. At issue here is the right claimed by each of these petitioners, under Section 9 of the Universal Military Training and Service Act, *supra*, pp. 2–4, to have his seniority as a journeyman established as of the earlier date upon which he would have completed the work period and obtained journeyman seniority had he remained continuously in civilian employment.[2]

The nature of the employment relationship between the Railroad and each of the petitioners is as follows:

1. *Tilton, Beck* and *McClearn*. The Brotherhood Railway Carmen of America is the duly designated collective bargaining representative of the "carman" class of employees of the Missouri Pacific Railroad Company (Tilt. R. 36). At least since the early days of the Korean war, and continuing to the present time, the Railroad has suffered from a shortage of journeymen "carmen mechanics" (Tilt. R. 56). A collective bargaining agreement between the Brotherhood and the Railroad has provided methods for remedying that shortage (Tilt. R. 42). Under its terms, whenever the Railroad is unable to employ persons presently qualified as carmen mechanics, provision is made for the advancement or "upgrading" of "carmen helpers" to full carman status.[3] Representatives of the Railroad and the Brotherhood jointly

[2] The Government acts on behalf of the petitioners by virtue of Section 9(d) of the Universal Military Training and Service Act, 50 U.S.C. App. 459(d).

[3] The applicable portions of the agreement are contained in the Tilton Record, pp. 42–46.

select the helpers to be so advanced (Tilt. R. 43). A helper so "upgraded" can then be employed by the Railroad to perform the work of a journeyman carman mechanic and is entitled to be paid a carman mechanic's wages (Tilt. R. 40).

Under the agreement, however, the upgraded helper does not immediately acquire seniority as a carman mechanic. Rather, Section 3 of the agreement provides that the upgraded man retains his helper's seniority until he completes 1040 days of actual work as a carman mechanic (Tilt. R. 44). At the end of that time the upgraded helper is automatically considered a "qualified carman." He may then acquire a seniority date as a carman mechanic merely by making an election to that effect in writing.[4] As the Railroad's Chief Personnel Officer acknowledged, an upgraded helper who has completed his 1040 days of work as a carman and elects to obtain seniority as a carman mechanic must automatically be accorded that seniority (Tilt. R. 58–60).

---

[4] The agreement provides, in pertinent part (Tilt. R. 44–45):

"A helper who has been or who is later advanced to carman will retain seniority as helper. When he has completed a total of 1040 days of service as carman he shall be considered as a qualified carman. At the completion of the 1040 days of service he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1040 days of service as such and relinquish his seniority as helper. If he fails to do so he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement. He may, however, at a later date be employed as a carman and acquire a seniority date as carman as of the date so employed but will automatically lose seniority as a helper."

Section 2 of the agreement further provides that a list of temporarily upgraded men is to be compiled and maintained in the order of their upgrading (Tilt. R. 44). That section also states that, although the date of upgrading is not to be considered as "a seniority date":

> When force reductions are made, the demotion from carman shall be in the reverse order of upgrading as shown on the upgraded list, the last men upgraded to be the first men demoted.

(Tilt. R. 44.) Moreover, an upgraded helper has a prior right to perform any available carman mechanic's work ahead of any helper "upgraded" after him (Tilt. R. 28, 41).

Petitioners Tilton, Beck and McClearn were initially employed by the Railroad as "carmen helpers."[5] As employees in the carman craft, they were and are represented by the Brotherhood and covered by the collective bargaining agreement (Tilt. R. 36). Each of these petitioners was upgraded to temporary carman status pursuant to the agreement,[6] and prior to induction each of the petitioners had worked as upgraded carmen "on substantially every day when carman work was available to him" (Tilt. R. 28, 31, 34). However, each was inducted into the armed forces before he could complete the 1040-day work period necessary to qualify automatically as a journeyman

[5] Tilton was first so employed by the Railroad Company on July 13, 1949 (Tilt. R. 26); Beck on May 12, 1950 (Tilt. R. 29); and McClearn on May 24, 1950 (Tilt. R. 32).

[6] Tilton was upgraded on April 10, 1950, Beck on October 12, 1951, and McClearn on August 23, 1951 (Tilt. R. 37, 38, 39).

carman mechanic.[1] Upon his honorable discharge, each of the petitioners promptly returned to the Railroad, was reemployed as an "upgraded" carman, and thereafter completed the 1040-day work period necessary to qualify for journeyman status (Tilt. R. 37–40). When eligible, each immediately elected to acquire seniority as a carman mechanic (Tilt. R. 41).

In each case, the Railroad established the seniority of these petitioners as carman mechanics as of the date each actually completed the work period (Tilt. R. 38, 39, 40), although, as the court of appeals observed (Tilt. R. 109), in their absence many men junior to them were permitted to "jump" petitioners in seniority:

> Twenty-nine non-veteran helpers in Tilton's case, six in Beck's and five in McClearn's, began work as upgraded carmen after the particular plaintiff had been so upgraded. They continued to work in that capacity while the plaintiff was in military service. These men were able to complete the 1040 day work period and to elect carman seniority before the plaintiff did so. They accomplished this, however, after the plaintiff would have reached that goal had it not been for his absence in service, had he worked whenever carman work was at hand, and had carman status been selected by him in preference to the retention of helper's status

[1] Tilton left the Railroad's employ to enter military service on October 12, 1951, by which time he had worked 145 days as a carman (Tilt. R. 37); Beck left for the service on March 1, 1955, after having worked 851 days as a carman (Tilt. R. 39); and McClearn left for service on October 23, 1951, after 21 days of carman work (Tilt. R. 38).

with its more advanced seniority. These non-veterans are now ahead of the plaintiffs on the carmen's seniority roster. They enjoy over the plaintiffs those advantages, such as work preference, order of layoff, and order of recall, which that seniority dictates.

Petitioners instituted these actions in the district court on October 15, 1959 (Tilt. R. 1). Claiming that, under the Universal Military Training and Service Act, they were entitled to be restored to a position of seniority among the men who had remained behind at the precise places which they would have occupied had they kept their positions continuously instead of entering military service, petitioners sought to compel the Railroad to accord them seniority as journeymen from the date they would have completed the 1040-day work period but for their absence in military service. The district court dismissed all three actions after a hearing on the merits.

The court of appeals affirmed, rejecting petitioners' contention that the instant case was squarely governed by this Court's decision in *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960. Relying, instead, upon its interpretation of *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, the court held that, in order for a veteran to be entitled to an advancement in status, "the promotion in question [must] be automatic and * * * seemingly * * * automatic as a matter of foresight rather than of hindsight" (Tilt. R. 115). The court concluded that advancement to full carman status in these cases did not meet that standard because it was subject to

"variables": lay-offs due to illness or reduction in force; the continuing unavailability of enough qualified carmen to fill carmen's positions; continuing satisfactory work by petitioners in the upgraded position; and petitioners' decisions as to whether or not to elect full carman status (Tilt. R. 116–117). Accordingly, the court held, the eventual acquisition by petitioners of journeyman carman status could not have been foreseen with absolute certainty at the time they left the Railroad's employ to enter military service and they were therefore not entitled, under the statute as interpreted in *McKinney*, to seniority in that status as of the time they would have achieved it but for their induction.

2. *Brooks.* Robert C. Brooks entered the employ of the respondent Missouri Pacific Railroad Company as an apprentice machinist at its Monroe, Louisiana, shops on July 5, 1951 (B.R. 7, 10). This employment relationship was (and is) subject to collective bargaining agreements between the Railroad and System Federation No. 2, Railway Employes' Department, A.F. of L.[8]

Under the terms of the agreements, advancement in status from apprentice to journeyman machinist is dependent upon completion of an apprenticeship program. This program consists of 1040 days of actual work as an apprentice and the satisfactory completion of a technical correspondence course (B.R.

[8] The "System Federation" is comprised of several unions representing non-operating railway employees, including *inter alia*, petitioner's union, the International Association of Machinists (B.R. 66).

23). The apprenticeship period is divided into eight periods of 130 days each. Rule 37 of the agreement provides in part (c) (B.R. 62) that, "[i]f within the first period of training an apprentice shows no aptitude to learn the trade, he will not be retained as an apprentice." After that period, however, an apprentice may not be dismissed "except for just and sufficient cause" (B.R. 62). Upon completion of his apprenticeship, a man qualifies as a journeyman machinist, although, prior to 1956, seniority in the latter status did not begin to run until the man was first employed in that capacity. The Railroad is obliged to hire such a qualified machinist in any situation where it is employing personnel other than journeymen (such as "upgraded" apprentices) to perform machinist's work (B.R. 51).

Seniority does not run generally throughout the Railroad's many workshops or "points." Rather, a man's seniority is restricted to the particular point at which he is employed (B.R. 44). If for any reason a journeyman is transferred to another point, he retains his qualification as a journeyman but goes to the bottom of the seniority ladder at the new point and also loses his seniority at his old shop (B.R. 61). The particular point at which a man holds seniority is of great importance. Continuing technological advances have reduced the frequency of overhauls of railroad equipment, with the consequence that many intermediate repair shops have been eliminated (B.R. 44–46). Seniority at a shop which is no longer used is obviously of little or no value.

Brooks left the Railroad to enter military service before he completed his 1040-day apprenticeship. He was inducted on February 1, 1952, honorably discharged on November 7, 1953, and reinstated as an apprentice machinist at Monroe, Louisiana, on November 23, 1953 (B.R. 7, 10). However, the apprenticeship program at Monroe was terminated and petitioner laid off on April 29, 1954, because of a reduction in force (B.R. 8, 11). In response to the Railroad's call for apprentice machinists, Brooks transferred to the Railroad's St. Louis, Missouri, shops on July 6, 1954, where he continued in the apprentice machinist at Monroe, Louisiana, on No apprenticeship program. On July 25, 1955, Brooks requested and was granted a transfer to the Railroad's North Little Rock shops, where he completed his apprenticeship on January 23, 1958. He was immediately employed there as a journeyman machinist (B.R. 8, 11).

The Railroad established Brooks' seniority as a journeyman at North Little Rock as of January 23, 1958 (B.R. 8, 11), the date he actually completed his apprenticeship. Brooks protested this seniority date. He demanded that his seniority at North Little Rock be fixed retroactively as of the date he would have completed his apprenticeship but for his military service. The Railroad offered Brooks such retroactive seniority, but only at its Monroe, Louisiana, shops (B.R. 11).* Brooks refused this offer as there was no work for machinists at Monroe.

*This offer was based upon the Railroad's construction of its collective bargaining agreements with the Union. In December of 1945, the Union and the Railroad had entered into

Brooks brought suit in the district court on September 20, 1960, under the Universal Military Training and Service Act, to compel the Railroad to accord him a retroactive seniority date as a journeyman at North Little Rock. The parties stipulated to the effect that, had Brooks remained in the Railroad's employ and not entered military service, he would have completed the apprenticeship period on November 3, 1955, and achieved seniority accordingly (B.R. 19).

The district court held that Brooks was entitled to retroactive seniority, finding that (B.R. 78):

> [T]he record here discloses that plaintiff had a contractual right under the basic agreement to complete his apprenticeship, that he would have completed the same in 1955 had he not been called into military service, and that had he completed it at that time he would, in point of practice, have been hired automatically as a journeyman machinist with seniority as of the date of completion of his apprenticeship.

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a "Memorandum of Understanding" as to the effect of what is now Section 9 of the Universal Military Training and Service Act upon the status of employees called into military service. That Memorandum provided, *inter alia* (B.R. 59), that:

"An apprentice who has entered military service and upon completion of such service returns to the railroad in accordance with the law and resumes his training as an apprentice, will, upon completion of his apprenticeship, be given a seniority date as of the date he would have completed his apprenticeship had he remained in the railroad service."

This Memorandum was construed by the parties as granting retroactive seniority only at the place where the veteran began his apprenticeship.

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The court further ruled that this seniority should be determined at North Little Rock and not Monroe, Louisiana. Granting seniority at Monroe, Louisiana, the court found, would depend upon hypothesizing events which could never have occurred, for the apprenticeship program at Monroe had terminated before Brooks could have completed it even had he not gone into service. The court observed that Brooks (B.R. 79):

> would have been required to complete his training in some other shop, and, on November 3, 1955, when training would have been completed plaintiff actually was employed at North Little Rock.

The court held that it was thus "not speculative" to conclude that, under the Act, plaintiff was entitled to retroactive seniority at North Little Rock.

The court of appeals reversed, relying upon its decision in *Tilton, et al.* v. *Missouri Pacific Railroad Company, supra.* It ruled that the date of Brooks' initial employment as a journeyman was unforeseeable because (B.R. 88):

> The balance between supply and demand of a particular category of workmen at a designated point at a future date cannot be foreseen or predicted with any degree of certainty.

Consequently, under the rule it had laid down in *Tilton,* Brooks' eventual advancement in status to journeyman at North Little Rock in 1955 was not "automatic" because it could not have been positively foretold in 1952 when he went into service.

SUMMARY OF ARGUMENT

I

Section 9 of the Universal Military Training and Service Act directs that veterans be restored to their civilian jobs without loss of status or seniority because of having served their country. The protection afforded by the statute assures that "those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service." *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 270, 272. This Court has construed the statute to mean that where advancement is dependent solely upon completion of a period of training which has been interrupted by military service a veteran is entitled to a seniority date in the higher position which reflects the delay caused by his induction. *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960.

II

Petitioners would have achieved the earlier seniority dates they now seek, simply by virtue of continued employment, but for their absence in military service. They were employed by the respondent railroad as apprentices or "upgraded" helpers—positions which led to automatic advancement to journeyman status after 1040 days of work. Each was called from his job, before completing the work period, to serve in the armed forces of the United States. Upon his return and completion of the interrupted work period, the railroad gave him journeyman's status, but with seniority

junior to his non-veteran co-workers who had continued uninterruptedly with the railroad. Each petitioner asks only that his seniority as journeyman be back-dated to the time he would have completed the 1040-day work period and automatically qualified as journeyman had military service not intervened, *i.e.*, that he be restored to his proper place among those who did not enter the armed forces. This is the very right that this Court held to be protected in the *Diehl* case.

III

The Eighth Circuit denied petitioners their claimed seniority because, viewed from the time of petitioners' entry into service, the dates upon which they would complete the 1040-day training period and acquire journeyman status could not be foreseen with certainty. There were, the court said, unpredictable "variables," *e.g.*, the continuing availability of work to be done, the state of the trainees' health, satisfactory performance, etc. Although similar variables were present in the *Diehl* case and were not held by this Court to be controlling, the court of appeals was of the view that *McKinney, sub silentio,* had overruled *Diehl* on this point.

This reliance on *McKinney* is misplaced. *McKinney* held only that the statute affords the veteran no assistance where management discretion, and not merely continued employment, plays a role in selecting persons to be advanced. The opinion made no mention of any requirement of absolute foreseeability and, indeed, itself strongly supports the conclusion that no such requirement exists. For the Court per-

mitted the veteran to plead anew and to prove, if he could, that in actual practice the promotion he sought would have been his simply by virtue of continued employment. Certainly, it was apparent that the facts of *McKinney* involved most of the "variables" present in the instant case.

The lower court's approach would defeat a fundamental purpose of Section 9 of the Act: to restore the veteran "in such manner so as to give him such status as he would have enjoyed if he had continued in such employment * * *." Continued satisfactory work, absence of serious illness, willingness to accept promotion, future changes in the industry—all of these are variables which are inevitably in the picture and can never be predicted with absolute certainty. To hold that one or more of these variables defeats a claim to advanced status or seniority is to say in substance that Section 9 has failed to achieve its objective and that the "escalator" principle (see *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278, 283) leads nowhere.

ARGUMENT

I. SECTION 9 OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AS CONSTRUED BY THIS COURT, GRANTS VETERANS THE RIGHT TO BE RESTORED TO THE SENIORITY THEY WOULD HAVE ACHIEVED SIMPLY BY VIRTUE OF CONTINUED EMPLOYMENT DURING THEIR ABSENCE IN SERVICE.

Petitioners bottom their claim for relief upon Sections 9(c)(1) and 9(c)(2) of the Universal Military Training and Service Act (*supra*, pp. 3–4). In Section 9(c)(1), Congress directed that veterans returning from military service be restored to their civilian

employment "without loss of seniority." The Court first considered this requirement in *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, when it construed the same provision in an earlier Act.[10] There the Court said: "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence." The protection granted the veteran was summarized as follows (328 U.S. at 284–285):

> Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * *

This "escalator principle" was reaffirmed by the Court in *Trailmobile Co.* v. *Whirls*, 331 U.S. 40,[11] and approved and restated in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278, 283, as follows:

> * * * [A]n honorably discharged veteran, covered by the statute, [is] entitled by the Act

[10] The present section is a reenactment of Section 9(c)(1) of the Selective Service Act of 1948, 62 Stat. 604, 614, as amended, 50 U.S.C. App. 459, which in turn reenacted Section 8(c) of the Selective Service and Training Act of 1940, 54 Stat. 885, 890, as amended, 50 U.S.C. App. (1946 ed.) 308. See, *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 271.

[11] In *Trailmobile*, the Court stated that the "restored veteran * * * could not be disadvantaged by his service to the nation" (331 U.S. at 58) and that his standing as a restored veteran includes "not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployment without going into the service" (331 U.S. at 56).

> to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.

As this Court noted in *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 271, this interpretation is now embodied in Section 9(c)(2) of the present Act, which provides:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.[12]

In applying the foregoing principle to concrete situations, this Court has followed a careful and consistent course succinctly summarized in *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 272:

> Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will

[12] 62 Stat. 604, 615–616, as amended, 50 U.S.C. App. 459(c)(2).

not be denied the veteran because of his absence in the military service. * * *

Section 9 of the Act, in other words, fully protects the veteran in his enjoyment of precisely that status and seniority which, under applicable collective bargaining contracts, he would have enjoyed simply by virtue of continued employment during the time he was in military service. Thus, the Court has held that a restored veteran is not entitled to super-seniority over non-veterans, for he would not have enjoyed this had he remained in continuous employment. *Fishgold* v. *Sullivan Corp., supra.* Similarly, a veteran has no right to advancement to a new position when advancement depends upon the exercise of discretion vested in the management, because such advancement does not depend merely upon continued employment during the time of military service. *McKinney* v. *Missouri-Kansas-Texas R. Co., supra.* Moreover, while the statute assures the returning veteran that he will enjoy a position equal to that which he would have gained by continuous employment, applicable collective bargaining agreements define the rights and benefits of this position. The statute grants no protection from loss of seniority in common with all fellow employees, veteran and non-veteran, resulting from a new collective bargaining agreement executed after the merger of the employer with another corporation, *Trailmobile Co.* v. *Whirls,* 331 U.S. 40; it does not provide seniority ahead of union officials where, under a collective bargaining agreement, their special status gives them seniority over all others regardless of length of service, *Aeronautical*

Lodge v. *Campbell*, 337 U.S. 521; and it does not furnish a right to object that, under applicable collective bargaining agreements, military service time was credited toward the seniority of other employees also, although they joined the company after service rather than before induction, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330. In sum, the veteran can claim only those benefits which are accorded, simply as a result of continued employment, to workers in the veteran's situation who continued in employment during the period of his absence.

Those benefits include advancements in position. In *McKinney* v. *Missouri-Kansas-Texas R. Co.*, *supra*, the Court, while rejecting a veteran's claim to advancement in position where promotion appeared to depend upon an exercise of managerial discretion and not simply continuous employment, nevertheless expressly afforded the veteran an opportunity to prove his entitlement to the higher status by demonstrating that, under actual custom and practice, he would have obtained the promotion in ordinary course. See, also, *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960; *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278, 281; *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C.A. 6); *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C.A.D.C.), certiorari denied, 339 U.S. 919.

The protected benefits of continued employment have also been held to include the right, upon completion of a fixed training period, to be assigned a seniority date as a journeyman based upon the date when the veteran would have completed his training period

and automatically obtained journeyman status had he remained continuously in his employment during the period of his military service. A returning veteran cannot claim a promotion that depends solely upon completing a prerequisite period of employment training unless he first works that period but, upon completion of that period of training, he can insist upon a seniority date in the higher position which reflects the delay in completing the requisite period of training caused by military service.

This precise issue was litigated and decided in *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960, reversing 211 F. 2d 95 (C.A. 3) which involved an employment situation almost identical to that of petitioners Tilton, Beck and McClearn. Diehl was a carman helper, temporarily "upgraded" to carman status. he was inducted into service from this upgraded position and, upon his return to the Railroad, restored to it. An agreement between the Railroad and the Union provided that upgraded men who had completed 1160 days of work in that capacity could elect journeyman carman status. It further provided that one electing journeyman status would be entitled to seniority "in the order with other men in which he completed 1160 days experience * * *" (211 F. 2d at 97). Upgraded men junior to Diehl had completed the work period. while he was in service and for that reason were given seniority ahead of Diehl. Upon completion of the training period, Diehl protested, claiming that, under Section 9 of the Act, he was entitled to seniority as of the earlier date on which he would have completed the work period but for his absence in military service. The Third Circuit held,

against the veteran, that the Act protects only rights which are a mere function of time in grade and does not entitle the veteran to be treated as if he had been actively employed or trained during the period of military service. This Court reversed, *per curiam*, holding that, upon the basis of facts stated in the opinion of the Third Circuit, Diehl was entitled to the seniority he claimed. 348 U.S. 960. The Court cited its opinion in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278. In *Oakley* it had said (338 U.S. at 283) that the Act entitles the veteran to be restored "to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment."

A similar result was reached in *Mann* v. *Crowell-Collier Publishing Co.*, 239 F. 2d 699 (C.A. 6), which involved an apprentice photo-engraver. At the time of his induction into the service, the governing collective bargaining agreement required six years of practical experience in order to become a journeyman. The Sixth Circuit held that, upon reemployment and completion of the apprenticeship period, the veteran was entitled under the Act to the seniority date he would have achieved had he not entered service, thus restoring him to his proper position among those who had remained in the employer's service. See, also, *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C.A.D.C.), certiorari denied, 339 U.S. 919; *Borges* v. *Art Steel Co.*, 246 F. 2d 735 (C.A. 2); *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C.A. 7), certiorari denied, 336 U.S. 967; cf. *Spear-*

mon v. *Thompson*, 167 F. 2d 626 (C.A. 8), certiorari denied, 335 U.S. 822."

Thus this Court's decisions have established (1) that veterans such as these petitioners are entitled to all of "those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment" (*McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 272) and (2) that the right to these advancements in status includes the right, upon completion of a training period of employment, to be accorded a retroactive seniority date as if the veteran had been continuously and actively employed during his period of military service (*Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960). It is against these standards that the present case must be decided.

II. BUT FOR THEIR ABSENCE IN THE ARMED SERVICES, PETITIONERS WOULD HAVE ACHIEVED EARLIER SENIORITY SIMPLY BY VIRTUE OF THEIR CONTINUED EMPLOYMENT

Each of these petitioners would, at an earlier date, have achieved journeyman seniority simply by virtue of continued employment, but for their absence in military service.

A. TILTON, BECK, AND MCCLEARN

Tilton, Beck, and McClearn had each been selected for "upgrading" from carman helper to temporary

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[11] *Bostian* v. *Seaboard Air Line R. Co.*, 211 F. 2d 867 (C.A. 4); *Addison* v. *Tennessee Coal, Iron & Railroad Co.*, 204 F. 2d 340 (C.A. 5); and *Gregory* v. *Louisville & Nashville Railroad*, 191 F. 2d 856 (C.A. 6), certiorari denied, 343 U.S. 903, were decided prior to, and overruled by this Court's decision in, *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960.

carman *before* his induction. Under the collective bargaining agreement, this was the sole point at which the Railroad exercised its discretion to promote men from helper to carman (Tilt. R. 43). Once a helper was "upgraded," he had a right, under the agreement, to do carman's work ahead of any man upgraded after him whenever such work was available. Moreover, throughout the absence of these petitioners, the Railroad was short of qualified journeymen to do carmen's work (Tilt. R. 40, 56). Finally, the agreement specifically provided that, at the end of 1040 days of work as a temporary carman, an upgraded helper "shall be considered as a qualified carman," with the contractual right to elect seniority as such (Tilt. R. 44)."

There is no room for doubt then, that, had Tilton, Beck and McClearn remained continuously on the job, they would have been able to complete the work period and qualify as journeymen in advance of those

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"Mr. Smith, the Railroad's Chief Personnel officer, confirmed that the Railroad had no discretion to refuse journeyman status to a helper who had completed the work period (Tilt. R. 58–59):

"Q. Now, you have testified that these men, when they completed their three years or thousand and 40 days of work, did not automatically acquire carman seniority. As soon as they made an election, the railroad had no choice but to give them seniority, did it?

"A. [Mr. Smith] Under the '42 agreement?

"Q. Under either the '42 agreement or the '53 agreement.

"A. [Mr. Smith] That's right.

"Q. In other words, as soon as they completed the work requirement, made the election as of that time, they became carmen and drew a seniority date?

"A. [Mr. Smith] Correct."

who "jumped" them in seniority during their absence. Each was entitled, under the agreement, to do carman's work ahead of any man upgraded after him. It was only because of petitioners' military service that men upgraded after them were able to work more days as carmen and to qualify as journeymen before them (Tilt. R. 40, Stip. 29).[18] But for their absence, petitioners would have qualified as journeymen carmen and achieved the seniority dates they now claim.

B. BROOKS

Petitioner Brooks would also have achieved journeyman status at North Little Rock at an earlier date had he remained in the Railroad's employ instead of entering the armed forces. Brooks was hired by the Railroad as an apprentice machinist at Monroe, Louisiana, on July 5, 1951. After serving about seven months of his apprenticeship, he was inducted into military service. He returned to the Railroad after his release and was reinstated as an apprentice at Monroe in November of 1953. (B.R. 7.) The apprenticeship program was terminated at Monroe, Louisiana, on April 29, 1954, and Brooks was laid off. However, in response to the Railroad's request for apprentices at St. Louis, he transferred to that city and continued his apprenticeship (B.R. 8). On July 25, 1955, with the Railroad's permission, Brooks transferred to the North Little Rock shops (B.R. 8). There he completed his apprenticeship on January 23, 1958, and

[18] The Railroad conceded that each of petitioners had worked as a carman on substantially every day upon which such work was available to them (Tilt. R. 28, 31, 35).

was immediately employed as a journeyman machinist (B.R. 8).

Having been hired as an apprentice (prior to entering military service), Brooks had a contractual right under the collective bargaining agreement to complete his apprenticeship (B.R. 78; 62.) The Railroad calculated that, if Brooks had not entered the military service, he would have completed the apprenticeship period on November 3, 1955. While journeyman's seniority prior to 1956 depended upon employment as a journeyman and not simply completion of the apprenticeship period, on November 3, 1955 (when Brooks would have completed his apprenticeship had he not been in military service), Brooks would have automatically been employed at North Little Rock (where he in fact was on this date) as a journeyman (B.R. 78–79).

The district court found that:

> While it is true that Rule 51 of the 1949 agreement appears to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, the evidence shows that in practice such discretion had no play, and that transition from the rank of apprentice to the rank of journeyman was automatic.

This finding is overwhelmingly supported by the record. It is undisputed that so long as there was journeyman's work being performed by upgraded apprentices the Railroad had no discretion to refuse to hire Brooks as a journeyman after he had completed the 1040-day apprenticeship work period (B.R.

50–51)." On November 3, 1955, and thereafter, there were upgraded apprentices working as journeyman machinists at respondent's North Little Rock shops (B.R. 21–23). The railroad would therefore have been obligated to hire Brooks as a journeyman at once unless it was prepared to downgrade all upgraded apprentices and forego having its machinist's work done. That this latter alternative to hiring Brooks on November 3, 1955, is wholly fanciful is indicated by the testimony of the Railroad's Special Assistant for Personnel who testified that an upgraded apprentice who completed his apprenticeship while upgraded "undoubtedly" would have been employed as a journeyman (B.R. 56):

> The WITNESS. * * * if an apprentice is upgraded he is upgraded because there is a shortage of mechanics and that shortage would

[16] Mr. Armstrong, the Railroad's Special Assistant for Personnel, testified that the Railroad would be obligated to employ an apprentice who completed his apprenticeship and applied for work at a "point" if, at the time of his application, the Railroad had upgraded apprentices doing journeyman's work at that point (B.R. 51):

"The WITNESS. * * * we have a right to upgrade apprentices when there is a shortage of machinists when it can be demonstrated that there is a machinist, a mechanic who wants the job, then we no longer have a right to upgrade the man in preference to hiring the machinist.

"The COURT. Well, now, I'm not talking about your right to upgrade; I am talking about your obligation to employ a particular individual. Once an apprentice has completed his apprenticeship, if there is work available and if he meets the physical and mental requirements, is the Railroad obliged to employ him if he wants to work, even though he has not one minute seniority?

"The WITNESS. I would say yes."

> continue through the time that he completes his apprentice training, and since we have said there is a shortage of mechanics we would undoubtedly employ him as a mechanic and he would continue to work in the shop. Now, the particular job he might work on might change because of the change in his status.
>
> Q. You undoubtedly would employ him? A. He would be upgraded only because there was a shortage of mechanics, machinists.

Finally, it is plain that Brooks was entitled to retroactive seniority as a journeyman at North Little Rock and not—as the respondents contend—at Monroe, Louisiana. As the district court found, under the actual practice of the Railroad and the Union, seniority is established at the point where a man is first employed as a journeyman (B.R. 80; B.R. 26–27). It is not a matter of speculation where Brooks would have begun work as a journeyman but for his military service. Brooks' absence in military service affected only the completion date of his apprenticeship—not his point of service on the Railroad. As already noted, after his military service Brooks returned to his apprenticeship at Monroe. But the apprenticeship program there was discontinued by the Railroad on April 23, 1954, almost eighteen months before Brooks would have qualified as a journeyman *even if he had never entered the military service.* In no circumstances, therefore, could Brooks have achieved seniority at Monroe.

Brooks transferred, as an apprentice, first to St. Louis (at the Railroad's request) and then to North Little Rock on July 25, 1955 (at his own request), both transfers occurring before he would have quali-

fied as a journeyman even had he not gone into service. Thus, we have here no attempt to reconstruct the past in order to take advantage of "what might have been." Rather, we have routine transfers by an apprentice, and there is no reason to presume that he would have proceeded differently had his employment continued uninterrupted. The district court was therefore warranted in finding, as it did, that Brooks would have been working at the Railroad's North Little Rock shops on November 3, 1955, the date upon which he would have completed his apprenticeship had he not gone into the Army (B.R. 80). That, of course, is exactly where he was on that date.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT A RESTORED VETERAN IS ONLY ENTITLED TO SUCH AUTOMATIC ADVANCEMENT IN STATUS AS COULD BE FORESEEN WITH CERTAINTY AT THE TIME HE ENTERED THE ARMED FORCES

We have demonstrated that each of the petitioners would have achieved the earlier seniority he claims simply by virtue of continued employment if he had not entered the armed services. The Eighth Circuit, however, denied the petitioners their claimed seniority because the date of completing the 1040-day training period and obtaining journeyman status, if viewed from the date of entry into military service, was subject to a number of variable factors. In its opinion in *Tilton*, the court listed the factors as including (Tilt. R. 116–117): whether work counting toward the training period would have been available; whether the trainee would have chosen and been in sufficient health to do the work; whether the trainee's

work would have been satisfactory to prevent discharge or reduction in status for cause; whether the veteran would have decided to relinquish seniority in the lesser position for the other benefits of the higher position. The Eighth Circuit acknowledged that most, if not all, of these uncertainties may have been dispelled by later events and that, at the time of suit, one could establish as a matter of fact that the veteran would have obtained the seniority position he now claimed (Tilt. R. 115). But, the court reasoned, this showing did not satisfy what it believed was probably a requirement imposed by the *McKinney* case (Tilt. R. 115):

> * * * that the promotion in question be automatic and that, seemingly, it be automatic as a matter of foresight rather than of hindsight.

Each of the variables or uncertainties relied upon by the Eighth Circuit was also evident in *Diehl* v. *Lehigh Valley Railroad Co.*, 348 U.S. 960, and plainly regarded by this Court as not controlling the result.[17] But the court of appeals construed the *Diehl* case so narrowly, and indeed inconsistently,[18] that it is ap-

[17] Most of these variables would also have been evident, though ignored by this Court, in one of the cases dealt with in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278, 281.

[18] The Eighth Circuit distinguished *Diehl* on the ground that "there was no uncertainty involved in the Diehl facts," because there it was stipulated that the claimant "'would have completed' the work period on a given date if there had been no military service interruption" (Tilt. R. 115–116). However, respecting petitioner Brooks, as to whom there was such a stipulation (B.R. 16), the court nevertheless rejected the veteran's claim on the ground that (B.R. 88):

"* * * The balance between supply and demand of a particular category of workmen at a designated point at a future date cannot be foreseen or predicted with any degree of certainty. * * *"

parent that it believed *Diehl* had been, for all practical purposes, overruled by *McKinney*. "[I]f *Diehl* and *McKinney* are in any way inconsistent in their holdings," it observed, "we must necessarily follow *McKinney* as the latest pronouncement by the Supreme Court" (Tilt. R. 117).

We submit, for several independent reasons, that *McKinney* was not intended to overrule *Diehl* and *Oakley*, and that a veteran is still entitled to all of the benefits, including advancements, that would have resulted simply from continued employment, whether or not this beneficial result would have been foreseeable as a certainty at the time of entry into military service.

A. There is not a mention of *Diehl* or of a requirement of foreseeability in the *McKinney* opinion. The reason, we submit, is that *McKinney* was concerned with a discrete problem. That case involved the applicability of Section 9 to claims for benefits that depend upon factors *other than continued employment*, such as lost opportunities for advancement by promotion on a merit basis or by election to union office. *McKinney* holds that the statute was intended to protect only those "changes and advancements in status that would necessarily have occurred simply by virtue of continued employment" (357 U.S. at 272) and not "all its possibilities of betterment" that "might have flowed from experience, effort, or chance" (357 U.S. at 272 and 271). It does not deal with the *Diehl*-type situation where advancement depends simply on continued employment.

McKinney was a railroad employee who held a "group 2" position when he went into service. In his absence, some positions in "group 1," a more desirable category, fell vacant. Under the governing collective bargaining agreement, when group 1 openings occurred, employees "in group two (2) [would] be given preference over nonemployes in the assignment to positions in group one (1), based upon fitness and ability * * *" (357 U.S. at 266–267). When McKinney returned from service he was given one of the group 1 positions. That position was subsequently abolished and McKinney dropped to a group 2 job. He protested, claiming that he should have been entitled to "bump" a nonemployee who had been hired to fill one of the other group 1 vacancies in his absence. The Court rejected his claim, noting (357 U.S. at 272):

> Promotion to a group 1 position from group 2, in which petitioner had formerly been employed, is not dependent simply on seniority. Under Rule 1(3)(A) of the collective bargaining agreement it is dependent on fitness and ability and the exercise of a discriminating managerial choice. * * * The statute does not envisage overriding an employer's discretionary choice by any such mandatory promotion. * * *

The factual determination that the exercise of the employer's discretion was a prerequisite to promotion of course dictated the conclusion that the advancement was not dependent upon continued employment alone.

B. The *McKinney* decision itself makes clear that the Court did not intend to adopt any rule of absolute foreseeability. McKinney had argued, alternatively.

that, because his claim was dismissed on motion in the district court, he did not have the opportunity to prove that "by custom and practice under the collective bargaining agreement he would necessarily have been assigned to the group 1 position * * * had he remained continuously in respondent's employ." 357 U.S. at 273. This Court affirmed the judgment, but granted McKinney "leave to petitioner to amend his complaint to allege, if such be the fact, that in actual practice under the collective bargaining agreement advancement from group 2 to group 1 is automatic". 357 U.S. at 274. Plainly, if the Court had intended to adopt a rule of absolute foreseeability of automatic advancement at a certain date, it would not have permitted McKinney to plead anew. For it was apparent that McKinney could never have predicted "with any degree of certainty," when he left for service, that (1) a group 1 position would fall vacant in his absence; (2) that he would elect to bid for it; (3) that he would be in adequate health to bid for it; and (4) that he would not have already lost his lower position because of unsatisfactory performance.

C. Most importantly, the Eighth Circuit's approach would necessarily defeat the achievement of the fundamental purpose expressed in Section 9(c)(2): to restore the veteran to his employment "in such manner so as to give him such status as he would have enjoyed if he had continued in such employment * * *."

For example, continued satisfactory work is invariably a precondition of continued seniority in a position. If the bare possibility that the veteran would

not have worked satisfactorily during the period of his absence bars a claim to the statutory protection, Congress was mistaken in thinking that even the most basic seniority rights would be safeguarded during the veteran's period of service.

Similarly, a willingness to elect a higher position is a precondition of every claim to an advancement of status that would otherwise flow simply from continued employment. The statute cannot protect the veteran's right to such advancement if the bare possibility of his refusing to make the election would preclude the application of Section 9.

The bare possibility that sickness might have prevented the veteran from continuing his employment during the period of his military absence is always present. Yet Congress could not conceivably have intended to make the veteran's restoration to the status he would have enjoyed dependent upon the requirement of proving that which, in the nature of things, cannot be conclusively established.

Again, no economist could predict with certainty future changes in an industry and the effect which they may have upon the availability of work for members of a particular craft.[19]

---

[19] The impact of the court of appeals' decision is not limited to any one industry. Nonetheless, it should be noted that a dominant aim of the legislation was to aid railroad employees. Representative May, who was in charge of the original bill containing the predecessor of Section 9(c) (see p. 18, *supra*), stated during the House debates, "I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character

In summary, there is no case in which it could be predicted with certainty, at the time the veteran entered the service, that all the conditions essential to obtaining an advancement in status would later occur. The decision below is thus incompatible with the declared purposes of Section 9 of the Universal Military Training and Service Act. Congress intended that the veteran enjoy all those benefits of continued employment which, on his return, the veteran can show (with the certainty generally requisite to establish legal rights) that he would have enjoyed simply by virtue of continued employment during the time he was in military service.

---

who have certain seniority privileges on the railroads." 86 Cong. Rec. 11702.

It is also appropriate to take some note of the decision's practical effects in that industry. Taking the instant cases as an example, it appears that in the carman and machinist crafts any new men selected to commence the apprenticeship programs must not be over 21 years of age. *Employment Outlook in Railroad Occupations*, Bulletin No. 1300–84, Bureau of Labor Statistics, Department of Labor (1961), p. 725. Even when "helpers" are to be upgraded, the railroads prefer those selected to be under 30. *Id.* The apprenticeship period usually lasts three to four years. *Id.* It is obvious that it is from exactly this group of young men that persons are selected for military service. If these young men are not protected under Section 9 of the Act, the seniority of almost no one in the railroad's entire carman and machinist crafts will be protected, for it is only through these apprenticeship and upgrading programs that persons can advance to journeyman mechanic status in these crafts. *Id.*

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgments of the court of appeals should be reversed.

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No. 49.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

DONALD I. TILTON, WILFRED L. BECK, JR., and GUY H. McCLEARN, JR.,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

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No. 49.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

DONALD I. TILTON, WILFRED L. BECK, JR., and GUY H. McCLEARN, JR.,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

STATUTE INVOLVED.

The provisions of Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as Amended, 50 U. S. C. App. 459), which the Court is asked to construe in this case, are as follows:

Reemployment Rights.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * * * *

(B) If such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay;

* * * * * * * *

(C) if such position was in the employ of any State or political subdivision thereof, it is declared to be the sense of the Congress that such person should—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay;

* * * * * * * *

Service Considered as Furlough or Leave of Absence.

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant

to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

Jurisdiction of District Court; U. S. District Attorney to Act for Claimant.

(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c) (1), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action:

* * * * * * * *

QUESTION PRESENTED.

When a period of on-the-job training prescribed by a collective bargaining agreement is intended to insure a degree of skill and proficiency and has to be actually

worked in order to qualify for a higher rated position, do Section 9 (c) and (d) of the Universal Military Training and Service Act require an employer to grant such position to a veteran, who does not qualify until after he returns from military service, retroactively as of a date when he could have qualified had it not been for his military service?

STATEMENT OF THE CASE.

The Solicitor General's office, representing the veterans in cases numbered 49 and 53, has filed a composite brief for both cases. While these two cases involve veterans' reemployment rights under the Universal Military Training and Service Act, and are against the same employer, they were filed in different districts, tried before different judges by different counsel, involve different facts and different issues. This brief therefore pertains only to case No. 49. A separate brief will be filed for the respondent in case No. 53.

As indicated by the opinion of the Court of Appeals (R. 105, 106), the facts were stipulated for the most part, and, in any event, the trial court's findings of fact were not challenged by the petitioners in the Court of Appeals, nor are such findings challenged here. Because the petitioners' statement has omitted certain background information and other material facts necessary to a complete understanding of the case, the respondent railroad deems it advisable to make the following statement:

The veterans who are petitioners in No. 49 were originally employed by the railroad as "carman," "helpers" (R. 37, 38 and 39). At the time they left the railroad's employment to perform military service, each was still classified as a carman helper and held seniority only as a carman helper (R. 98).

It is necessary to understand that a helper and a journeyman carman are separate and distinct categories of employees in the railroad's Car Department. As the title implies, the carman-helper is hired to assist the journeyman carman and to do the unskilled or semi-skilled work in connection with repairing and maintenance of railroad cars (R. 94). On the other hand, a journeyman carman, otherwise referred to herein as a carman, is a skilled

craftsman, trained and experienced in all phases of car building and car maintenance. Under Rule 118 of the basic collective bargaining agreement between the railroad and the Brotherhood of Railway Carmen of America, which represented both carmen and helpers, a helper was restricted to the work described therein and had no right to perform carman's work (R. 101).

Separate seniority lists are maintained for helpers and for carmen. Except for the provisions of the December 7, 1953, agreement hereafter described, these veterans as carman helpers had no right to transfer from the helpers' seniority list to the carmen's seniority list, no matter what their experience or skill (R. 58 and 101).

Prior to World War II, the ranks of carmen were filled primarily from apprentices who successfully completed a 4-year training program in all phases of carmen's work (R. 94). Carmen were never hired from the ranks of helpers, who, up to that time, were never allowed to do carman's work and thus to learn the trade. However, when the railroads' car requirements expanded enormously during World War II, while at the same time the supply of skilled carmen was depleted, the railroads found it impossible to fill all carman's positions with qualified carmen. Therefore, the railroads sought and obtained from the union representing the carmen a modification of the basic agreements to permit them to utilize the service of apprentices and helpers for carman's work whenever carmen were unavailable. In order to induce the helpers and apprentices to do the carman's work, it was agreed that after a certain period of actual experience at doing the work of carman, during which these persons would learn the trade sufficiently to qualify as carmen, they would have the right to acquire carman's seniority, if they so elected, provided they gave up their helper's seniority (R. 53, 60).

During the war and until May of 1947, the minimum period established by agreement for the qualification of a helper as a carman was three years of actual experience working as a carman (R. 98). Then there was an interval from 1947 until the 1953 agreement when no agreement was in effect giving helpers any right to become carmen. However, during that interval they were permitted to work as carmen, and under Rule 116 of the Basic Agreement, could be found qualified after four years of experience in doing carman's work and the carrier at its election could hire them as carmen. In either case, if they elected to take carmen's seniority, they would start at the bottom of the carman's seniority list (R. 98). Finally, on December 7, 1953, the railroad and the union arrived at the agreement with which we are primarily concerned in this case (R. 99). It is the terms of this agreement which create any rights which these veterans may have to a carman's seniority.

It was during the interval from 1947 to 1953 that petitioners Tilton and McClearn left their railroad employment in order to perform military service. At that time, neither one had completed the 4-year work requirement for qualification under the provisions of Rule 116 of the Basic Agreement (R. 100). At that time Tilton had done carman's work only 145 days and McClearn only 21 days (R. 100). These two veterans returned to their employment with the railroad prior to the effective date of the 1953 agreement.

Petitioner Beck did not leave for military service until 1955. At the time he entered military service, he had accumulated a total of 851 days' work as a temporary carman (R. 100).

The December 7, 1953, Agreement.

The agreement is set out in full at pages 42 to 46 of the Record. It established a system for using apprentices and helpers to perform carman's work "when the carrier is unable to employ qualified carmen" (R. 42). The system set up a priority order in which various classes could be used to do carman's work, to-wit: (1st), truckmen; (2nd), regular apprentices who have served 520 days of apprenticeship; (3rd), helper apprentices; and (5th), helpers, first choice to be made from helpers with two or more years of service.

Secondly, the agreement provided that helpers to be advanced or upgraded to carman's positions would be selected jointly by the master mechanic or superintendent of the railroad, and the local committee of the union (R. 43). This selection of helpers for upgrading was to be made from those "who are qualified for advancement" (R. 43). By such qualification the parties intended aptitude for learning the trade and skills of carman. Therefore, the upgrading of a helper did not imply that the helper so selected was considered a qualified carman (R. 100). As a matter of practice, selection of helpers for upgrading was not always in seniority order (R. 100).

Third, helpers who were selected for upgrading under this agreement were to retain their seniority as helpers and acquire no seniority as carmen (R. 44). This meant that at any time after they were upgraded, they could exercise their seniority rights as helpers to take any helper's position that was available and they were not required to take carman's work. As a matter of fact, a helper's position was sometimes preferred because it may be in a better location, with better hours, and perhaps have more overtime pay (R. 79 and 82).

Fourth, apprentices and helpers who were upgraded for carman's work were listed in the date order of their

upgrading. While this upgrading date had some of the attributes of seniority, the agreement expressly negatived any implication that it was a seniority date (R. 44, Section 2). The effect of this date is stated in Section 5 (R. 45), which gave the upgraded men who made application for carmen's vacancies the right to be assigned to such vacancies in the order of their position on the upgraded list, provided there were no bids from qualified carmen.

Fifth, it was expressly provided that helpers who had been upgraded would retain their position on the upgraded list while they were in the armed services (R. 45, Section 4 (c)).

Sixth, the most significant feature of the agreement was the following which is worth quoting:

> "A helper who is later advanced to carman will retain seniority as helper. When he has completed a total of 1,040 days of service as carman, he shall be considered as a qualified carman. At the completion of 1,040 days of service, he will make his choice in writing to acquire a seniority date as carman as of the ending date of the 1,040 days of service as such and relinquish his seniority as helper. If he fails to do so, he will return to status of helper and will not again be considered in the selection of men for advancement under this agreement" (R. 44).

The 1,040 days' work requirement established by the above quoted rule, like the 4-year work requirement in Rule 116 of the Basic Agreement, was intended by the parties as a period of on-the-job training for the purpose of increasing proficiency and skill through actual experience. The actual practice under these contracts, at least from the time any of the petitioners were first upgraded, was in accord with that intention (R. 100).

Pursuant to the 1953 agreement, the defendant kept an actual record on each upgraded helper of the days he worked in a carman's position. When a helper had accumulated 1,040 days of work in a carman's position, he was notified by the railroad so that he could make his election between his helper's seniority and a carman's seniority. If he chose a carman's seniority, he was placed at the bottom of the carman's seniority roster (R. 99).

Upon completion of their military service, the veterans were restored to their previous position as carman helpers without loss of seniority, and each was also temporarily advanced to the position of carman, in accordance with his position on the upgrading list, because of the continued shortage of carmen (R. 98). They continued working in a carman's position until they were notified that they had accumulated a total of 1,040 days of work in such positions (including days so worked prior to their military service) and upon being so notified, they elected to relinquish their helper's seniority and to take a carman's seniority as of that date. The defendant thereupon accorded each of these veterans seniority dates on the carman's seniority list as of the date following completion of the 1,040-day work requirement (R. 100).

The petitioners' statement on page 8 of their brief that "in their absence many men junior to them were permitted to 'jump' petitioners in seniority" is inaccurate and misleading. Petitioners **held no seniority as carmen** when the men junior to them on the helpers' list transferred to the carmen's list pursuant to the 1953 agreement. Therefore, these men could not "jump" or go around petitioners on the carmen's seniority list.

On the basis of the foregoing facts, the District Court and the Court of Appeals concluded, on the authority of this Court's opinion in the **McKinney** case, that the

veterans' transfer or promotion to the position of carman from the position of helper was not automatic and would not necessarily have occurred as a matter of right prior to the time when the junior upgraded men became qualified for promotion. The courts below concluded that the showing of high probability of promotion, had the veterans continued in their employment, does not meet the burden of proving that promotion was a matter of automatic progression. Judgment for the defendant was entered by the District Court and affirmed by the Court of Appeals, reported at 306 Fed. 2d 870.

SUMMARY OF ARGUMENT.

Section 9 of the Universal Military Training and Service Act grants to veterans the right to be restored to their former position without loss of seniority and with such rights as have attached to that position while they were on leave of absence. Section 9 (c) (2), enacted in 1948, does not create new rights but merely incorporates the escalator principle which the Supreme Court in the **Fishgold** case had applied to identical provisions of the 1940 Act. Under that principle, an employee on leave of absence from his job, whether in military service or otherwise, accumulates seniority, and upon his return is entitled to whatever rights have attached automatically to his position during his leave of absence. He can claim these rights upon his return. He cannot, however, claim any rights which, under the collective bargaining agreement and practice existing at his place of employment, are contingent upon proof of fitness and ability, or upon attainment of a certain skill and proficiency. **McKinney v. MKT**, 357 U. S. 265.

Where, as in the present case, the collective bargaining agreement and practice thereunder require that an employee successfully complete a prescribed period of on-the-job training, designed to increase his skill and proficiency, before he is considered fit and able to qualify for promotion, Section 9 does not grant a right to claim such fitness and ability retroactively. In such circumstances promotion is not dependent "simply on seniority or other form of automatic progression." Nor can an employee on leave of absence, including employees in military service, be given credit toward such requirement while on leave of absence, because during that period they cannot be acquiring increased skill or proficiency.

The veterans here have admitted that in order to be qualified for promotion they must first successfully com-

plete the required period of training. They have also admitted, and the Court has found, that even if they had been working, promotion would not have been automatic but, on the contrary, would have been contingent upon variable factors. Thus promotion was not in seniority order. It was a matter of meeting the agreed test of skill and proficiency by completing the required training period and then affirmatively exercising a choice between helpers' seniority and promotion to carman.

The veterans have been granted seniority as a carman as of the time they earned the right to be promoted to carman, strictly in accordance with the provisions of the collective bargaining agreement and practice thereunder. Their reemployment rights have not been violated.

ARGUMENT.

I. Where a period of on-the-job training must be actually worked in order to qualify for promotion to a higher position, Section 9 of the Universal Military Training and Service Act does not grant returning veterans a right to such position until they have so qualified, even though they probably would have qualified earlier had they been able to continue working during their period of military service.

This case requires a construction of Sections 9 (c) and (d) of the Act as applied to the particular circumstances here presented. The Supreme Court has not previously been presented with similar circumstances. Since the case turns on the language of the statute and the intention of Congress in using such language, we again quote pertinent portions of Section 9 and discuss each subsection separately.

A. Subsection 9 (b) requires restoration to position previously held.

Subsection 9 (b) provides, in part, as follows:

> "(b) In the case of any such person who, in order to perform such training and service, has left or leaves a **position** (other than a temporary position) in the employ of any employer * * *.
>
> "(B) if such position was in the employ of a private employer, such person shall—
>
> "(i) if still qualified to perform the duties of such position, **be restored** by such employer or his successor in interest **to such position** or to a position of like seniority, status and pay; * * *."

With respect to the provisions of Section 9 (b) (B) it should be emphasized that this subsection gives the return-

ing veteran the right to be restored only to such position as he held when he went into military service; it does not grant him any right to any different position or classification.

In the case of **Fishgold v. Sullivan Dry Dock and Repair Corp.**, 328 U. S. 275, 90 L. ed. 1230, which is the leading case construing the similar provisions of the 1940 Act, the Court said:

> "He must be restored to his former position 'or to a position of like seniority, status and pay.' Section 8 (b) (A), (B). He is thus protected against receiving a job inferior to that which he had before entering the armed services. (l. c. 284.) • • •
>
> "The 'position' to which the veteran is restored is the 'position' which he left plus cumulated seniority." (l. c. 287.)

It is clear that the Supreme Court did not construe Section 8 (b) of the 1940 Selective Training and Service Act as granting to the veteran any right to be restored to a classification or position different from the position held when he left his employment.

In other words, disregarding other provisions in the Act, this subsection does not give to these veterans any right to any position other than the helper positions and the positions on the upgrading list, which they occupied when they left for military service. These positions they admittedly received (R. 98).

B. Subsection 9 (c) (1) treats the veteran as having been on leave of absence.

Subsection 9 (c) (1) provides in part:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or

(B) of Subsection (b) shall be **considered as having been on furlough or leave of absence** during his period of training and service in the Armed Forces, shall be so **restored without loss of seniority,** shall be entitled to participate in insurance or other benefits offered by the employer pursuant to establish rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, * * *"

It will be noted that this subsection grants to the veteran three separate rights **upon his restoration to his previous position,** to-wit:

1. The veteran shall be considered as having been on furlough or leave of absence while in the military service.

2. He shall be restored without loss of seniority.

3. He is entitled to any other benefits offered by the employer relating to employees on furlough or leave of absence.

These three rights apply only to the veteran's status in the position previously held, the position to which he is to be restored. They insure against any loss of seniority in that position, and assure the veteran only such rights and benefits as would accrue to employees who are on leave of absence from their jobs. Nothing in this subsection requires that veterans be considered as though they had continued to work.

These veterans were restored to their positions without any loss of seniority or other benefits accruing to employees on leave of absence (R. 98). They do not contend otherwise.

C. Subsection 9 (c) (2) is a reaffirmation of the escalator principle.

Not having any basis for their claim in Subsections 9 (b) (B) or 9 (c) (1), these veterans are relying entirely on Subsection 9 (c) (2). They contend that the provisions of this subsection require the employer to give them such status or position as they might have earned if they had been able to continue on the job during their period of military service, even if this requires giving them a new position never before held by them.

Subsection 9 (c) (2) provides as follows:

> "It is hereby **declared to be the sense of the Congress** that any person who is restored to a position in accordance with the provisions of Paragraph (A) or (B) of Subsection (b) **should be so restored** in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the Armed Forces until the time of his restoration to such employment."

1. Section 9 (c) (2) Is Not Mandatory.

The first hurdle they must get over is the precatory language in which this subsection is couched. It will be noted that in this subsection, Congress very deliberately chose to use the terms, "It is declared to be the sense of Congress" and "should be so restored," instead of the language used in the preceding subsections, to-wit: "Such person shall be restored" and "shall be considered" and "shall be entitled." It seems obvious that the difference in language used in 9 (c) (2) indicates Congress' intention that it operate in a manner different from the preceding subsections. By comparing the language in 9

(c) (2) with the language in 9 (b) (C), one can only con
clude that Congress did not intend 9 (c) (2) to be an
enforceable obligation.

9 (b) (C) has language similar to 9 (c) (2):

> "If such position was in the employ of a state o
> political subdivision thereof, **it is declared to be the
> sense of Congress** that such person **should** * * * re
> stored * * *."

There can be no doubt that Congress used this precatory
language in 9 (b) (C) because it did not intend to mak
it an enforceable obligation that the states reemploy
veterans. It has been so held in the cases of **McLaughlin
v. Retherford**, 207 Ark. 104, 184 S. W. 2d 361 (Ark. 1944)
and **Rutherford v. City of Nashville**, Tenn. Court of Ap
peals, March 27, 1948, 21 L. R. R. M. 2618, 14 Labor Case
(C. C. H.), No. 64,413. Likewise, the Bureau of Veteran
Reemployment Rights, which is in charge of enforcing re
employment rights under the Act, has so construed thi
language. In its Reemployment Rights Handbook (rev
1954), Question and Answer No. 28 read as follows:

> Q. What protection do employees of states and thei
> local and municipal subdivisions have under the Uni
> versal Military Training and Service Act?
>
> A. The Universal Military Training and Servic
> Act contains no mandatory provisions covering such
> employees. However, it is declared to be the sens
> of Congress that employees of states, or politica
> subdivisions thereof, should be restored to their posi
> tions. * * *

It is highly appropriate therefore to ask the Bureau and
the veterans: If the language is not mandatory as used i
Section 9 (b) (C), why should the same language be con
sidered mandatory when used in 9 (c) (2)?

The fact that Congress did not intend 9 (c) (2) to be mandatory is clearly proven by the amended language of Section 9 (d), the enforcement section. At the time Congress passed the Selective Service Act of 1948 and added Subsection 9 (c) (2) to the previous section on reemployment rights, **it did not** at the same time amend 9 (d) to **provide for the enforcement of 9 (c) (2).** On the contrary, it amended 9 (d) as follows:

> "In case any private employer fails or refuses to comply with the provisions of **subsection (b) or subsection (c) (1)** or subsection (g), the District Court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition or other appropriate pleading by the person entitled to the benefits of **such provisions,** specifically to require such employer to comply with such provisions. * * *"

It will be noted from this language that the District Court is not given any jurisdiction to require the employer to comply with Subsection (c) (2). How then can the Courts require the employer to comply with (c) (2), even if it means what these veterans say it means?

2. **Section 9 (c) (2) Does Not Mean Continued Working.**

Assuming that the veterans get over the hurdle that Section 9 (c) (2) is not an enforceable obligation, the second hurdle they must get over is the fact that in using the words "if he had continued in such employment continuously," Congress apparently did not intend that he must be considered as if he had continued working on the job. The legislative history of this subsection is exceedingly illuminating.

When Section 9 (c) (2) was enacted in 1948 as part of the Selective Service Act of 1948 (Act of June 24, 1948, Chapter 625, Title 9, Section 9, 62 Stat. 614), it followed

the language of Senate Bill 2655. In its report on that bill, the Senate Committee on Armed Services in Senate Report No. 1268 reported to the Senate as follows:

"Section 9. Separation from service; reemployment rights.

This section, which contains 11 subsections, is similar to, but not identical with, section 8 of the 1940 act. The committee has taken the position that, as a matter of policy, no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act. **For that reason no important substantive changes have been made in the provisions of the 1940 act.** Several procedural changes, which seem to be justified by past experience, have been introduced." (Emphasis added.)

* * * * * * *

"(c) Benefits which accrue to the individual during his absence. (1) Benefits to which entitled: This paragraph reenacts section 8 (c) of the 1940 act. It preserves certain benefits, incident to Federal or private employment, to which persons are restored after completion of service, such as accumulated seniority rights and insurance benefits. In addition, the paragraph prohibits the individual's being discharged or laid off without cause within 1 year after restoration. (2) **Statement of policy regarding application of the 'escalator principle'**: The provisions of this legislation differ from those contained in the Selective Training and Service Act of 1940, as amended, in that it is specifically stated to be the intent of the Congress that persons restored to Federal or private employment be restored so as to give them the status which they

would have enjoyed if they had remained in such employment continuously during the time of their service in the armed forces."

(The complete Senate report concerning Section 9 is found in the Appendix, page 41.)

The language of the House bill differed considerably from the language of the Senate bill which was finally adopted. House Bill 6401, Section 8 (d), provided, in part, as follows:

"(d) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed forces, **shall be entitled to all promotions, increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority to which he would have been entitled had he been working for the employer during his period** of service in the armed forces, * * *"

(The complete language of Section 8 of the House bill is printed in the Appendix at page 45.)

The Conference Committee which met to resolve the differences between the Senate bill and the House bill chose to adopt the language of the Senate bill with respect to reemployment rights. The complete report of the Conference Committee with respect to reemployment rights is printed at page 43 of the Appendix.

The significant fact that Congress rejected the specific language of the House bill giving veterans the right to all promotions, etc., which they would have had if they had been **working** in their old positions indicates more clearly than anything else that Congress had no intention of requiring that the veteran must be treated as if he had been

steadily working on his job during his period of military service and be given all the advantages which would have accrued to him on that assumption. Yet the veterans here are basing their case entirely on the proposition that if they had been working steadily on their job during their period of military service, they would have been entitled to promotion at an earlier time. They are trying in this case to persuade the Court to give them rights which Congress deliberately decided not to give them.

3. Section 9 (c) (2) Reaffirms the Escalator Principle, Not as a New and Independent Right, But as a Guide to the Application of Section 9 (c) (1).

Assuming, therefore, that Section 9 (c) (2) was not intended to require that veterans be treated as if they had been working on the job, the next question is, what effect did Congress intend it to have?

It will be noted from the report of the Senate Committee that in its view, "No important substantive changes have been made in the provisions of the 1940 Act," and that Section 9 (c) (2) was intended as a "statement of policy regarding the escalator principle." At the time this amendment was enacted, there was nothing in any of the decisions of the Supreme Court construing the 1940 Act which indicated that this Court thought the employer must treat the veteran as though he had been actually on the job during his period of military service, rather than treating him as having been on furlough or leave of absence. The statement of policy of the Senate Committee regarding application of the escalator principle had obvious reference to the Supreme Court's decision in the **Fishgold** case, which had first announced that principle when interpreting the language of Section 8 (c) of the 1940 Act. This section was re-enacted without change as Section 9 (c) (1) of the present Act.

It is obvious from reading the **Fishgold** case that the Court there did not intend the escalator principle to mean that a veteran be treated as if he had been working continuously on the job. The Court said only that—

> "A furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence. And whether either results from unilateral action by the employer or otherwise, consequences are quite different from termination of the employment relationship. Section 8 (c) of the Act recognizes that insurance and other benefits may continue to accrue to an employee on furlough or on leave of absence. **An employee on furlough or on leave of absence has a continuing relationship with the employer;** he retains a right to be restored to work under specified conditions" (328 U. S. 275, l. c. 287).

If, as contended by these veterans, we construe the words "in such employment continuously" as used in Section 9 (c) (2) to mean actually **working** continuously in such employment, then we have an irreconcilable conflict between Subsections 9 (c) (1) and 9 (c) (2). It is obviously impossible for a man to be on furlough or leave of absence from his employment, and at the same time to be actually working at his job. Surely the decision of the Supreme Court in the **Diehl** case does not mean that the Court failed to recognize this obvious fact. An employee on furlough or leave of absence may accumulate seniority and may acquire other rights during his absence, but he cannot be acquiring the experience and training or the increased skills which result only from actually working at his job. Therefore, in order to construe these two subsections so that they can be consistent with each other, it is necessary to find some other meaning for the words "in such employment continuously."

It is of course a cardinal principle of statutory construction that, where at all possible, different sections of a statute must be construed so as to be consistent with each other. Citations are deemed unnecessary.

The words in 9 (c) (2) can be reconciled with those of 9 (c) (1) by treating the veteran as if he were on furlough or leave of absence while at the same time he continues his employment relationship with his employer. Such relationship normally continues during furlough or leave of absence; the absent employee is still considered an employee and is retained on the seniority list during his absence. He does not lose any right to which his seniority entitles him.

Therefore, in the light of its legislative history, as well as simple logic, we submit that Section 9 (c) (2) was not intended to create additional rights, but was intended only to reaffirm the rights previously granted by Section 8 (c) of the 1940 Act, as it had been interpreted by the Supreme Court in the **Fishgold** case. It was intended solely as a guide to the Courts in the interpretation of Section 9 (c) (1) to insure that 9 (c) (1) would be interpreted the same way as the former Section 8 (c).

D. **The escalator principle, as it has been recognized in Supreme Court decisions, requires that the veteran be granted only such rights as ordinarily result from accumulated seniority while on leave of absence, independently of fitness and ability.**

We find no indication in the Supreme Court's opinions that in announcing the so-called "escalator principle", it intended to create any new rights for veterans. In the **Fishgold** and subsequent cases, it was construing the leave of absence test of Section 8 (c) in the 1940 Act, or Section 9 (c) (1) of the 1948 Act. It recognized that seniority rights and other rights of employees are not

terminated when they are on a leave of absence; that in the normal employment situation such absent employee remains on the seniority roster, continuing to accumulate seniority while absent; that during his absence, additional rights may be created which benefit those who are on leave of absence in common with those who remain at work. The Supreme Court correctly held, therefore, that upon the employee's return to work, "he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." 328 U. S. 275, 284.

In the case of **Trailmobile v. Whirls**, 331 U. S. 40, the Court recognized that, with respect to job rights, being on furlough and leave of absence may be synonymous with being continuously employed. Thus in describing the rights of the returning veteran, the Court said:

> "He was to be restored and kept, for a year at least, in the same situation, if he had not gone to war but had remained continuously employed or had been on 'furlough or leave of absence'." l. c. 58.

In other words, the escalator principle treats the employee as on furlough or leave of absence but grants him accumulated seniority and gives him whatever rights and benefits accrue to employees with such seniority. It does not, however, give him rights which depend upon fitness and ability, whether such fitness and ability is a matter of employer discretion or is a matter of actual work experience. The **McKinney** case settled this interpretation of the escalator principle as embodied in 9 (c) (2).

McKinney v. M-K-T, 357 U. S. 265, 2 L. ed. 2d 1305.

The plaintiff in this case was classified and held seniority in a "Group 2" clerical position when he left for

military service. In his absence, a "Group 1" position was bulletined, and in the absence of applications from Group 2 employees, a new employee was hired to fill the position. McKinney claimed that, upon his return from military service, he should receive a seniority date in the Group 1 position as of the date the position was bulletined. The applicable contracts provided:

> "Promotion will be confined to the group * * * with the exception that employees on positions enumerated in Group 2 will be given preference over non-employees in the assignment to the positions in Group 1, based on fitness and ability. * * * An employee returning after leave of absence may return to former position or may upon return exercise seniority rights to any position bulletined during such absence."

The Court held that the plaintiff was not entitled to the Group 1 position merely because he might have bid on it and might have been given the position. The Court laid down the following tests:

> "Section 9 (c) (1) states that he shall be restored 'without loss of seniority.' In Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 285, 90 L. ed. 1230, 1239, 1240, 66 S. Ct. 1105, 167 A. L. R. 110, and Oakley v. Louisville & N. R. Co., 338 U. S. 278, 283, 94 L. ed. 87, 91, 70 S. Ct. 119, the same provision in an earlier act was interpreted to mean that a returning veteran does not step back at the exact point he left his employment, but rather is entitled to 'a position which, on the moving escalator of terms and conditions affecting that particular employment would be comparable to the position which he would have held if he had remained continuously in his civilian employment.' 338 U. S. at 283. This interpretation is now embodied in Sec. 9 (c) (2) of the present Act.

"However, **Section 9 (c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute.** Section 9 (c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and **advancements in status that would necessarily have occurred simply by virtue of continued employment** will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained **as of right**, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

"Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, **not simply on seniority or some other form of automatic progression**, but on the exercise of discretion on the part of the employer." 357 U. S. 265, 270. (Emphasis added.)

Thus it is clear that rights which do flow from experience and effort, rather than from seniority, are not encompassed by the escalator principle. An employee on leave of absence cannot acquire such rights. Only those rights which accrue to all employees within the same seniority class, whether or not on leave of absence, can be claimed by the returning veteran. So where a right of promotion is not dependent solely upon accumulated seniority or similar automatic progression, but on accumulated experience and proficiency, as in this case, the

escalator principle embodied in Section 9 (c) (2) does not grant such right to the returning veteran.

This interpretation of the escalator principle, even prior to the **McKinney** case, was supported by many decisions from the several Courts of Appeals.

Railroad Cases.

Jefferson v. ACL, 303 F. 2d 522 (C. A. 5, 1962);
Sulars v. MStP&SS, 259 F. 2d 122 (C. A. 8, 1958), Affg. 148 F. Sup. 83;
Bassett v. Texas Pacific, 258 F. 2d 819 (C. A. 5, 1958);
Poor v. L&N, 235 F. 2d 687 (C. A. 5, 1956);
Bostian v. Seaboard Air Line, 211 F. 2d 867 (C. A. 4, 1954);
Raulins v. Memphis Union Station, 168 F. 2d 466 (C. A. 6, 1948);
Boston & M. v. David, 167 F. 2d 722 (C. A. 1, 1948);
Hewitt v. System Federation, 161 F. 2d 545 (C. A. 7, 1947);
Gregory v. L&N, 92 F. Supp. 770, Affd. Per Cur. 191 F. 2d 856 (C. A. 6, 1951), Cert. Den. 343 U. S. 903.

Non-Railroad Cases.

Horton v. U. S. Steel, 286 F. 2d 710 (C. A. 5, 1961);
Lipscomb v. Tennessee Coal, 189 F. 2d 708 (C. A. 5, 1951);
Altgens v. Associated Press, 188 F. 2d 727 (C. A. 5, 1951);
Special Service v. Delaney, 172 F. 2d 16 (C. A. 5, 1949);
Nevins v. Curtiss Wright, 172 F. 2d 535 (C. A. 6, 1949);
Trischler v. Universal Potteries, 171 F. 2d 707 (C. A. 6, 1948), Affg. 78 F. Supp. 609.

All of these cases denied the veteran a promotion to a higher rated job after his return because he could not

show that such promotion would have been granted solely on the basis of accumulated seniority.

The petitioners on page 23 of their brief have mentioned the cases of **Mann v. Crowell-Collier Publishing Co.**, 239 F. 2d 699 (C. A. 6), and **Borges v. Art Steel Co.**, 246 F. 2d 735 (C. A. 2). These cases do not support their position. In the **Mann** case, a period of six years' training for apprentices was required at the time the plaintiff went into military service. During his absence, this training period was reduced to five years. Upon his return, the employer voluntarily or by reason of an existing agreement granted him retroactive seniority, but based it upon the six-year requirement instead of the new five-year requirement. The Court held that the veteran was entitled to such seniority on the five-year basis. This decision is no authority for the granting of retroactive seniority on an involuntary basis. It could have been based solely on the principle that the veteran is entitled to the benefit of any changes in agreements made in his absence.

In the **Borges** case, returning veterans were held entitled to the benefit of wage increases negotiated during their absence, which the agreement gave only to employees with a certain number of days of working service. The basis of the Court's decision is shown in this quotation:

> "Where pay increases or promotions are awarded on the basis of skill or merit, and not on the basis of the mere passage of time, they cannot be regarded as the fruits of seniority, e. g., Addison v. Tennessee Coal, Iron & R. Co., 5 Cir., 204 F. 2d 340; but **here the only requirement for the increase was to have actually been on the job for a length of time.** Inasmuch as these eleven plaintiffs were employed as laborers and the increases reached all employees of all degrees of skill, there can be no serious contention

that the requirement of actual service was designed to reward proficiency acquired through experience, rather than mere seniority."

The Diehl Case Distinguished.

Petitioners rest their case primarily on the per curiam decision by the Supreme Court in **Diehl v. Lehigh Valley**, 348 U. S. 960, 99 L. ed. 949, decided March 14, 1955, reversing the decision of the Third Circuit, reported at 211 F. 2d 95. The fact that the Supreme Court offered no explanation for this reversal, except to cite the **Oakley** case, 338 U. S. 278, makes it somewhat difficult to know what the Supreme Court had in mind. The **Oakley** case decided nothing more than a veteran's right to reemployment beyond one year. The Court's opinion, however, stated that the veteran is entitled to be restored to "a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment." (Citing **Fishgold.**) This language of the Court in the **Oakley** case does no more than reaffirm the escalator principle of the **Fishgold** case. It does not support the construction of 9 (c) (2) contended for by the veterans.

The **Diehl** case was decided solely on the pleadings. The trial court had dismissed Diehl's complaint on motion and the Court of Appeals affirmed, holding that the facts alleged in the complaint did not show a violation of his reemployment rights. The facts alleged, as reported in 211 F. 2d, were as follows:

Diehl was employed as a carman-helper in 1942. In 1943, because of the shortage of qualified carmen, he and other helpers were upgraded and worked as carmen. Shortly after he was upgraded, he went into military service. At that time, there was no agreement regarding the

seniority status of upgraded helpers. In 1944 the railroad and the union agreed that they would determine the seniority status of upgraded helpers after the war was over. Diehl returned to work in 1945 and worked as a carman until March, 1949, at which time the railroad and union made an agreement. This agreement provided: "A carman-helper, who has qualified as a carman-mechanic, and is presently working on position of a temporary carman-mechanic on the effective date of this agreement, shall be given the opportunity to make an election within 15 days after the date of his being notified of having worked 1,160 days as a temporary carman-mechanic" to take a carman's seniority as of the date of the agreement and to forfeit his helper's seniority. The agreement further provided that those who elected a carman's seniority were to rank on the seniority list in the order in which they had completed 1,160 days as temporary carman. Diehl completed his 1,160 days on January 10, 1949. The complaint alleged and the Court, therefore, had to assume in ruling on the motion that if he had not been in military service, **Diehl would have completed his 1,160 days on June 1, 1946, and would have ranked ahead of four other helpers** who completed their 1,160 days after that date.

The District Court and the Court of Appeals held, under Section 8 (c) of the 1940 Act, Diehl must be treated as if he had been on leave of absence and not as if he had been continuously employed. The Court construed the words "continuously employed" in Section 9 (c) (2) of the 1948 Act as the equivalent of "continuously at work." It, therefore, found that there was an inconsistency between the provisions of 9 (c) (1) and 9 (c) (2). It chose to follow 9 (c) (1) because of the fact that it was mandatory whereas 9 (c) (2) was not.

When the case was presented to the Supreme Court, the only question for it to decide was whether the Appellate

Court had been correct in completely rejecting the continuous employment test. While we cannot determine what actually decided the Court, we assume that its reversal of the 3rd Circuit indicated only that the continuous employment test was not inconsistent with the leave of absence test. But if that is the correct interpretation of the ruling, then it necessarily follows that "continuous employment" was not, in the mind of the Court, equivalent to "continuous working," but was equivalent to "continuously employed," or "continuously in an employment relationship." As we have pointed out, working on a job in St. Louis or Kansas City is necessarily inconsistent with fighting a war in North Korea. A veteran cannot be treated as if he were doing both at the same time.

If the Supreme Court had intended by its per curiam decision to establish the new principle urged by petitioners, and to overrule the decisions in the appellate courts, it would surely have furnished a complete explanation of its ruling in an opinion.

A most enlightening and thorough analysis of the **Diehl** case was made by Professor Herbert L. Sherman, Jr., Professor of Law, University of Pittsburgh, in an article entitled "Seniority and Promotion Rights of Reemployed Veterans," 17 Pitts. L. R. 20 (1955). This article is reprinted in the Appendix, page 48. Among other very pertinent observations, Professor Sherman said this:

> "If counsel for the veteran and counsel for the company and union agree that mere passage of time is sufficient to qualify an employee for a higher status, as **was the position of counsel, in effect, in the Diehl case in arguing before the Supreme Court**, then the Court should clearly rule that service in the Armed Services may be substituted for service in the plant. On the other hand, where experience on the job is the gist of the practice and the contractual requirement,

the Courts should not substitute military service for the necessary experience. By deciding the Diehl case in one sentence, the Supreme Court would seem to have left prior law on this question undisturbed."

Unlike the present case, there was no evidence and no finding by the Court that the work requirement was intended to be and was in actual practice treated as a period of training, successful completion of which was the agreed test of skill and proficiency. For all that appears in the **Diehl** case, the requirement may have been met solely by the elapse of 1,160 days time from the date Diehl was first upgraded to carman, and he may have been considered a qualified carman when first upgraded.[1]

II. Under the controlling agreement and the other facts of this case, the period of on-the-job training must be actually worked and successfully completed before a helper was considered sufficiently skilled for promotion to carman. Promotion was not dependent simply on seniority or other form of automatic progression.

A. The controlling agreement and practices thereunder required, as the test of fitness and ability, that a helper accumulate a total of 1,040 days of actual work as a carman, before he could claim a right to promotion. An employee on leave of absence could not count the time on leave as time actually worked.

The findings of the District Court, together with admissions made by petitioners, conclusively establish the fact that the agreement of December 7, 1953, prescribed a period of on-the-job training which had to be actually worked in order for these veterans to qualify for promo-

[1] If so, the case was similar to the case of *Spearman v. Thompson* (C. A. 8 1948), 167 F. 2d 626.

tion and acquire any rights to promotion to the position of carman. Finding No. 9 of the District Court shows that when a helper is first selected for temporary upgrading to carman's work, he is not considered a qualified carman at that time; he is considered only to have sufficient aptitude for learning the trade and acquiring the skills required of a carman (R. 99). Finding No. 10 of the District Court establishes that the 1,040-day work requirement was intended by the parties as a period of on-the-job training for the purpose of increasing proficiency and skill through actual experience. The actual practice under the contract was in accord with that intention. Upgraded helpers were required to complete 1,040 days of work in a carman's position before they were considered sufficiently skilled to be promoted to the position of carman (R. 100).

These petitioners have admitted in their briefs that they had to successfully complete the prescribed period of on-the-job training, and that this was a condition precedent to their acquiring any carman's seniority. Thus, on page 22 of their brief, they state:

> "A returning veteran cannot claim a promotion that depends solely upon completing a prerequisite period of employment training unless he first works out that period."

The successful completion of the work requirement was the agreed test of fitness and ability to become a carman. In **McKinney**, the veteran was denied a retroactive promotion primarily because he could not show that the employer in its discretion would necessarily have found him fit and able as of the date he claimed. The fact that he was later promoted to Group 1, and that the former uncertainty as to his fitness and ability had been removed, was not sufficient proof of his qualification as of an earlier date.

Here, too, the veterans cannot prove fitness and ability until they have passed the agreed test. They did not do so until the day before they were promoted, and the fact that they might have done so earlier is too uncertain a basis for requiring that they be given a retroactive date.

B. Qualification for promotion was independent of seniority, and therefore the veterans had no contractual right to be promoted ahead of any junior man, even if they had remained on the job.

The original complaints filed in these cases alleged that the veterans would have qualified for the position of carman on a certain date, to-wit, Tilton on April 1, 1953 (R. 6), Beck on December 5, 1955 (R. 7), McClearn on April 20, 1956 (R. 8). In their second complaints they alleged that they would have completed 1,040 days of carman's work "before the date when the first carman-helper upgraded after him or junior to him completed 1,040 days' work," and "that he would have then elected carman's seniority" (R. 14, 19, 25).

In order to prove these allegations, the plaintiffs offered evidence to show that had they been working during the period of their military absence, they would have chosen at all times to do carman's work whenever such work was available, and that after successful completion of 1,040 days of such work, they would then have elected to give up their helper's seniority to take a carman's seniority. They tried to show that promotion would have necessarily been granted to them before it was granted to any junior upgraded man. After a full trial, however, the Court found the facts against the plaintiffs. The Court found that helpers temporarily upgraded to carman's positions under the 1953 agreement had no guarantee that they would ever complete the 1,040-day work requirement. The evidence showed that many helpers so upgraded have

never completed the work requirement (R. 65). Whether they would have completed, and when they would have completed it, depended on a number of variable factors, among which were (1) lay-offs due to illness or reductions in force, (2) continuing unavailability of enough carmen to fill carmen's positions, and (3) continued satisfactory work by the helper in his upgraded position (R. 101).

The Court further found:

1. That it was uncertain whether plaintiffs would have worked as carmen on every date that such work was available to them (R. 101). The evidence showed that some men did not (R. 79 and 82).

2. It was uncertain whether these veterans would have elected to relinquish their helper's seniority upon completion of the work requirement. The evidence again showed that some men did not (R. 81).

3. It was also uncertain whether plaintiffs would have completed the work requirement prior to the next upgraded helper. The evidence showed that the completion of the work requirement was not always in the order of upgrading (R. 73).

Because of these and other uncertainties as to when the veterans would have been promoted had they continued to work, the Court concluded that promotion was not a matter of seniority or some other form of automatic progression (R. 102, 103). As noted by the Court of Appeals in its opinion (R. 110), the veterans "do not contest the existence of various conditions or uncertainties surrounding the completion of their 1,040 days actual work on the job * * * There is indeed nothing 'automatic' about their completion of the work requirement." In spite of these admissions in their appellate court brief and in spite of findings by the Court that there were un-

certainties surrounding completion of the work requirement and that such completion was not automatic, the veterans are still contending here that they were entitled to a seniority date as of the date when they would have completed the work period had they remained continuously in civilian employment. (Pet. Brief, p. 5.)

The trouble with their contention is that it flies right in the face of the decision in **McKinney** to the effect that where promotion is dependent upon fitness and ability, measured in this case by actual experience on the job, rather than on seniority or other form of automatic progression, the veteran cannot claim such promotion retroactively on his return. The facts found by the District Court show conclusively, as far as this Court is concerned, that promotion to carman was not a matter of seniority and that such promotion was not necessarily in seniority order.

When the District Court and the Court of Appeals held that promotion to carman was contingent on variable factors which could not be made certain retroactively, what they meant was that because of such contingencies, advancement would not **necessarily** have occurred as of right simply by virtue of continued employment. The District Court concluded therefore that "a showing of high probability of promotion to a better position does not meet the plaintiffs' burden of proving that such promotion was a matter of automatic progression" (R. 103).

The railroad contends that the Act does not require it to assume that these veterans were actually working and acquiring experience on the job during the period of their military service, but even if we are required to make such assumption, we cannot assume that the right to promotion which depends on factors other than seniority will be acquired in seniority order as claimed by these veter-

ans. For example, if these veterans had remained on the job and at any time had taken a leave of absence on account of illness or other personal reasons, or had chosen at any time to work as helper instead of as carman, then a junior man who continued to work as carman would gain on the veteran and perhaps pass him up in accumulated experience as carman. This, however, could not have happened if promotion was merely a matter of seniority.

The veterans are in essence attempting to convert a condition precedent into a condition subsequent. This position ignores the fact that under the contract which gives them whatever rights they may have to a carman's seniority, they were entitled to such seniority only upon the condition that they complete the prescribed period of on-the-job training and only upon condition that they elect "to acquire a seniority date of carmen **as of the ending date of the 1,040 days of service as such**" (R. 44). There was of course no obligation upon these veterans to elect to take a carman's seniority as of that date or any other date. They could have retained their helper's seniority, but having elected to take the carman's seniority they are bound by the provisions of the contract establishing their right to do so. They cannot have their cake and eat it, too. They must take the disadvantages with the advantages. If they elect a carman's seniority pursuant to the contract, they must elect to take it as of the date of completion of the 1,040 days of work experience. Nothing in the Act gives them a right to anything more. The veterans' seniority rights are subject to the nondiscriminatory provisions of the collective bargaining agreements creating such rights. As stated by this Court in **Aeronautical Lodge**:

> "Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other

instances it is effective only as from the qualifying date" (337 U. S. 521, 526).

The veterans here were accorded seniority as carmen in strict accordance with the provisions of the collective bargaining agreements (R. 100).

We should bear in mind the rights of other employees, as well as the rights of the veterans. In determining seniority we are dealing with an employee's rights to work as against fellow employees. Each of the other helpers who qualified for promotion to carman had to make the election as to whether he would relinquish his helper's seniority and go to the bottom of the carman's seniority list **as of the date he qualified.** The employees who so elected to give up their helper's seniority are not parties to this lawsuit and are not present to protect their interests. The respondent's motion to make them parties was denied (R. 2). If the veterans have a right to elect promotion retroactively, do these other carmen then have the retroactive right to change their mind about their election? And yet one or more of these men might lose his job if all veteran helpers are allowed retroactive seniority dates. If they had known that all veterans were to be placed ahead of them on the seniority list at some time in the future, perhaps they would have chosen to retain their helper's seniority where they were more secure.

Of course, every veteran would very much like to be able to make up all that he lost due to military service, but it is obviously impossible to resurrect the past and place every veteran in the same position with respect to employment as though he had never been in military service. Military service is a burden which most of the male population has had to bear at one time or another. Nearly all have suffered some loss on account of military service. These veterans have to stand some loss, too. The loss to

them is due to their inability to finish a required course of training until they were out of military service. While Congress has clearly given them the right to be restored to their previous position without loss of seniority, we submit that they have not been given the right to claim that they were skilled carmen before they actually earned that right.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the question presented at the beginning of this brief must be answered in the negative and the judgments of the Court of Appeals should therefore be affirmed.

ROBERT W. YOST,
Attorney for Respondent.

M. M. HENNELLY,
Of Counsel.

September, 1963.

APPENDIX.

Senate Report No. 1268, May 12, 1948, to Accompany S. 2655.

(U. S. Code, Congressional Service, 80th Congress, 2nd Session, 1948, Vol. 2, pp. 1989. 2003.)

VI. Section-by-Section Analysis.

Section 9. Separation from service; reemployment rights.

This section, which contains 11 subsections, is similar to, but not identical with, section 8 of the 1940 act. The committee has taken the position that, as a matter of policy, no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act. For that reason no important substantive changes have been made in the provisions of the 1940 act. Several procedural changes, which seem to be justified by past experience, have been introduced.

(a) Certificates of service; physical examinations.—This subsection re-enacts subsection 8 (a) of the 1940 act, except for changes in terminology necessary to conform to the terminology used in the National Security Act of 1947. It provides for the furnishing to those who complete satisfactorily their respective periods of service a certificate to that effect, and for their physical examination both at time of entry into service and at time of separation therefrom.

(b) Reemployment rights.—This subsection gives reemployment rights to persons who leave employment with either a private employer or the Federal Government and its agencies, and who receive a certificate of satisfactory

completion of service and make proper application for reemployment. If any such person left a position (other than a temporary position) in the employ of the Federal Government or its subdivisions, and is still qualified to perform the duties of such position, he would be restored thereto, or to another position with like seniority, status, and pay. However, if he were not qualified to perform the duties of such position by reason of disability sustained during his service, but was qualified to perform the duties of any other position, he would be entitled to be restored to the nearest similar position consistent with the circumstances in his case.

If any such person left a position in the employ of a private employer he would be entitled to similar reemployment rights as in the case of Federal employment, unless the private employer's circumstances had so changed as to make it impossible or unreasonable to restore him to the employment.

It is declared to be the intent of the Congress that, if any such person was in the employ of any State or political subdivision thereof, he should be given reemployment rights similar to those given to Federal Government employees hereunder.

The principal difference from the 1940 act is the provision giving a right to employment in the nearest similar position, the duties of which he can perform, to the person disqualified to perform the duties of his former position by reason of disability sustained during his period of service.

(c) Benefits which accrue to the individual during his absence. (1) Benefits to which entitled: This paragraph reenacts section 8 (c) of the 1940 act. It preserves certain benefits, incident to Federal or private employment, to which persons are restored after completion of service,

such as accumulated seniority rights and insurance benefits. In addition, the paragraph prohibits the individual's being discharged or laid off without cause within 1 year after restoration.

(2) Statement of policy regarding application of the "escalator principle": The provisions of this legislation differ from those contained in the Selective Training and Service Act of 1940, as amended, in that it is specifically stated to be the intent of the Congress that persons restored to Federal or private employment be restored so as to give them the status which they would have enjoyed if they had remained in such employment continuously during the time of their service in the armed forces.

Conference Report No. 2438, June 19, 1948, on the Selective Act of 1948.

(U. S. Code, Congressional Service, 80th Congress 2nd Session, 1948, Vol. 2, pp. 2011, 2016).

Statement of the Managers on the Part of the House.

Reemployment Rights.

The Senate bill provided that persons completing their periods of service under the act and securing restoration to their former positions in accordance with the terms of the act should be restored without loss of seniority. The bill contained a declaration by the Congress to the effect that persons so restored should be restored in such manner as to give them the status in their employment which they would have enjoyed if they had continued in their employment continuously. The Senate bill contained detailed provisions with respect to the enforcement of the reemployment rights of Federal Government employees and gave the Civil Service Commission the

power to issue necessary rules, regulations, and orders to assure that the restoration rights would be effective. It contained no specific provisions with respect to court proceedings for restoration to positions in the Federal Government. The Senate bill designated the Secretary of Labor, acting through the Bureau of Veterans Reemployment Rights, as the Federal official to render aid to veterans in obtaining restoration to their former employment. The bill also contained a provision authorizing and requesting the President to formulate and recommend to Congress plans for the rehabilitation and retraining of veterans serving after the date of enactment of the legislation.

The House bill provided that those restored to positions pursuant to the terms of the act should be entitled to all promotions, increases in pay, vacation rights and accumulations of seniority to which they would have been entitled if they had been working in their old positions during their periods of service. The House amendment, unlike the Senate bill, did not specifically prohibit the lay-off, within 1 year after his restoration, of a person restored to employment under the provisions of the legislation. The House amendment also contained detailed provisions with respect to the restoration to their positions of those veterans who held positions under the Federal Government prior to the beginning of their periods of service. These detailed provisions included specific authority for such persons to obtain court orders requiring their restoration to positions under the Federal Government. The House amendment designated the Director of Selective Service as the Federal official charged with the duty of rendering aid to veterans in obtaining restoration to their former positions.

The conference agreement adopts the language of the Senate bill with respect to reemployment rights, except

that (1) the provision of the Senate bill authorizing and requesting the President to formulate and recommend to Congress plans for the rehabilitation and retraining of veterans was eliminated, and (2) the provision of the House amendment deleting the prohibition against lay-offs of restored veterans was adopted.

House of Rep. Bill No. 6401,
80th Cong., 2d Session.

Union Calendar No. 909

80th Congress
2D Session

H. R. 6401
(Report No. 1881)

In the House of Representatives
April 30, 1948

Mr. Andrews of New York introduced the following bill; which was referred to the Committee on Armed Services May 7, 1948.

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed.

Sec. 8 (a) Any person inducted into the armed forces under this Act for service, who, in the judgment of those in authority over him, satisfactorily completes his period of service under section 4 (b) shall be entitled to a certificate to that effect upon the completion of such period of service, which shall include a record of any special proficiency or merit attained. The Secretaries of Army, Navy, or Air Force shall furnish to the Selective Service System hereafter established a report of separation for each

person separated from active duty. In addition, each such person who is inducted into the armed forces under this Act for service shall be given a physical examination upon separation and, upon his written request, shall be given a statement of physical condition by the Secretary concerned: **Provided** That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary concerned would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes written application for reemployment within ninety days after he is relieved from such service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions or political subdivisions thereof, or the District of Columbia, such person shall be restored to such position or, if such position no longer exists, to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer or his successor in interest shall restore such person to such position, or, if such position no longer exists, to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be re-

stored to such position or, if such position no longer exists, to a position of like seniority, status, and pay.

(c) If any such person is not qualified to perform the duties of such position by reason of disability sustained during such period of service but is qualified to perform the duties of some other position, then, in the case of paragraphs (A) and (B) of subsection (b) he shall (and in the case of paragraph (C) of subsection (b) it is hereby declared the sense of Congress that he should) be employed at such other position as may provide the nearest possible similarity in seniority, status, and pay.

(d) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed forces, **shall be entitled to all promotions, increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority to which he would have been entitled had he been working for the employer during his period of service in the armed forces,** shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer, and shall not be laid off or discharged from such position without cause within one year after such restoration.

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b), subsection (c), or subsection (d), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions,

specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: **Provided**, that such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: **Provided**, That no fees or court costs shall be taxed against any person who may apply for such benefits: **Provided further**, That only the employer shall be deemed a necessary party to any such action.

Seniority and Promotion Rights of Reemployed Veterans.

Herbert L. Sherman, Jr.*

Although several landmark decisions concerning the reemployment rights of veterans under the Selective Training and Service Act of 1940[1] have been handed down by the United States Supreme Court, this area of the law

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[1] 54 Stat. 885 (1940), 50 U. S. C. A. App. § 301 et seq. (1951). A discussion of the relationship between seniority systems and the rights of veterans during the early days of the Act may be found in *Seniority and Re-employment Rights of War Veterans*, 54 Yale L. J. 417 (1945).

continues to be a fertile source of litigation. In recognition of this fact and anticapating a greater number of reemployment rights cases because of a reduction in the size of the armed forces, Congress increased its appropriation to the Bureau of Veterans Reemployment Rights of July 18, 1955.

Despite the lapse of fifteen years since the enactment of the basic statute, the courts are still plagued by such fundamental questions as how to measure the seniority credit of a returning veteran who had left his employment to serve in the armed forces, and whether a veteran, upon reemployment, may compel his employer to promote him to a different and higher ranking job than the position he formerly occupied if he might have been promoted had he not served in the armed forces. With the passage of time it will also become necessary for the courts to determine whether the Universal Military Training and Service Act of 1948,[2] whose language is substantially iden-

[2] 62 Stat. 604 (1948), 50 U. S. C. A. App. § 451 *et seq.* (1951). This statute, originally enacted as the Selective Service Act of 1948, was amended and renamed in 1951. It was also amended in 1950, 1953, and 1955.

According to the official answers to questions arising in connection with the Armed Forces Reserve Act of 1955, prepared by the House Committee on Armed Services, a three to six months trainee under that statute is likewise entitled to veterans' reemployment rights. See answer to Question 36. L. R. X. 5845. But in *Christner v. Poudre Valley Coop. Assn.*, 36 L. R. R. M. 2688 (1955), a federal district court in Colorado held that a reserve officer who returned from his annual training period cannot sue for reemployment in a federal court and through the local U. S. Attorney. The Court rules that the Universal Military Training and Service Act's provision permitting suits in the federal courts without meeting ordinary jurisdictional requirements is not available to reservists. It is indicated, however, that since the reservist's claim for reemployment arises under federal law, he could maintain an action in a federal court if the amount in controversy exceeds $3,000. The Justice Department plans to appeal the case since the decision may have an adverse effect on reservists training under the Armed Forces Reserve Act of 1955.

Since the court in the *Christner* case indicated that reservists performing training duty only were probably excluded from the

tical with that of the Selective Service and Training Act of 1940, was intended, because of an ambiguous additional provision, to provide any greater reemployment rights in these situations to veterans who qualify under that Act. The following discussion points up the impact of some of the most recent developments on the state of the law in connection with these troublesome issues.

(Discussion of Earlier Landmark Cases Omitted.)

The Diehl Case.

Facts: The most recent case to be decided by the United States Supreme Court on the question of measuring a veteran's seniority is **Diehl v. Lehigh Valley R. R.**[14] Diehl was employed as a car-man helper in June, 1942. Eight months later, on February 19, 1943, he was promoted to the job of "temporary car-man mechanic." He served on this job until he left for military service. From April 15, 1943, to October 20, 1945, Diehl was in the armed forces. On November 11, 1945, he was re-employed by the railroad as a "temporary car-man mechanic." In the meantime, the Union and the Railroad had agreed that the seniority rankings of incumbents of this job would be determined at the expiration of the war emergency.

On March 1, 1949, a supplemental agreement was reached by the Railroad and the Union. It provided as follows:

> "A car-man helper, who has qualified as a car-man mechanic . . . and is presently working on position

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operation of the law by inadvertence, amendments to the law that will correct the apparent oversight are under consideration, according to Secretary of Labor James P. Mitchell. However, amendment of the law may be unnecessary if the Tenth Circuit court of appeals finds that the present law *does* apply to reservists performing training duty only, as well as to reservists performing a period of extended active duty. 37 Lab. Rel. Rep. 5 (Nov. 7, 1955).

[14] 211 F. 2d 95 (3d Cir. 1954), *rev'd per curiam*, 348 U. S. 960 (1954).

> of a temporary car-man mechanic on the effective date of this Agreement, shall be given the opportunity to make an election within 15 days after the date of his being notified of having **worked 1160 days** as a temporary car-man mechanic to be placed on the permanent car-man mechanics' roster with seniority date as of the effective date of this agreement **in the order with other men in which he completed 1160 days' experience** . . . and if so electing shall forfeit his seniority as a car-man helper." (Emphasis added.)

Pursuant to the agreement Diehl was placed on the permanent car-man mechanics' seniority roster. Four individuals, however, were given higher rankings on the seniority roster than Diehl, who, by his suit, was seeking a higher seniority ranking than those of the four individuals. Diehl actually completed 1160 days on the mechanic's job on January 10, 1949. Without the interruption of his war service, he would have completed the required number of days June 1, 1946. The four individuals completed their 1160 days in the intervening period—after June 1, 1946, but before January 10, 1949.

These are the facts as set forth in the opinion of the Third Circuit court of appeals. In a per curiam decision the Supreme Court, in holding for the veteran, said:

> "Upon the facts disclosed in the opinion of the Court of Appeals for the Third Circuit, 211 F. 2d 95, the applicable Acts of Congress, and the opinion of this Court in Oakley v. Louisville & Nashville R. Co., 338 U. S. 278, the judgment of the Court of Appeals is reversed. Mr. Justice Reed dissents for the reasons given in the opinion of the Court of Appeals for the Third Circuit."

Analysis: The first significant point to be noted is that Diehl was already an incumbent of the higher position—

the car-man mechanic job—both when he left for military service and when the 1949 Agreement was reached, having been reassigned without dispute to that position upon his return from service. Upon his request for reemployment with the Company, an interesting question could have arisen. Since he was labeled a "temporary" car-man mechanic when he left for service (despite the fact that he was regularly assigned to this position for almost two months before entering the service and for several years after his return), should section 8 (b) of the 1940 Act, when it speaks of restoration to a position "other than a temporary position," be held to mean that Diehl was not entitled to be restored to the "temporary" car-man mechanic job? Or is this statutory language directed at an entirely different problem, that of whether the very employment relationship itself was merely temporary? The latter problem was the central issue in the **Venzel** case, considered *supra*, and is clearly distinguishable from the factual situation presented by the **Diehl** case where the employment relationship was clearly not temporary. If the quoted language of section 8 (b) is confined in its application to the question of the **Venzel** case (whether the employment relationship is probationary), it has no bearing on the **Diehl** case situation, and Diehl could have been held entitled to the job which he apparently was filling regularly in practice when he left. And if the quoted language is applicable to the **Diehl** case situation, it could be held that he was still entitled to this job on the ground that neither it, nor his relationship with it, nor his whole employment relationship was in fact "temporary."

In any event, Diehl was "restored" to the "position" which he left. Thus, it was unnecessary for the Court to determine which of several possible bases should be accepted as supporting the premise that Diehl was properly reassigned to the job he actually held when he left for mili-

tary service. The issue had become moot by the actions of the parties. And Diehl had no basis for complaining of his seniority status at this time, since there was still pending an agreement of the Union and the Railroad that the seniority rights of incumbents of the "temporary car-man mechanic job" would be determined at the expiration of the war emergency. Moreover, since he was placed on the permanent car-man mechanics' roster under the terms of the 1949 agreement, the only remaining question involved his seniority status in his assigned job in the light of this agreement. His "position," when he left for military service, under the realities of the situation, was that of car-man mechanic. The word "temporary," as used in the March 1, 1949, agreement, seems to mean only that passage of a certain amount of time would qualify an incumbent for a place on the permanent seniority roster for car-man-mechanics. It does not appear, for example, that incumbents were actually on a probationary status, *e. g.*, that they could be removed or downgraded without cause. Nor were they merely filling an occasional turn when "permanent" car-man mechanics were unavailable. It further appears that they were receiving the rate of pay for car-man mechanics.

It may be argued that the Supreme Court accepted and followed the agreement of the Union and the Railroad to some extent, but rejected it in part—to the extent that the agreement failed to recognize that veterans would have completed 1160 days much earlier had it not been for military service. This would be consistent with earlier statements that even an agreement between a Union and a Company cannot validly discriminate against veterans as a class. The Court obviously followed the agreement to the extent that Diehl was placed on the permanent car-man mechanics' seniority roster by virtue of this supplemental contract. Although this part of the agreement and

the effective date of Diehl's seniority, the date of the contract, are apparently accepted by the Court, the language "in the order with other men in which he completed 1160 days' **experience**" is not **literally** followed. Since Diehl did not gain 1160 days of **experience as a car-man mechanic** while he was in the armed forces, it may be argued that the Court rejected part of the agreement.

On the other hand, the Court may not have intended to reject any part of the agreement, but merely to construe it in a practical manner. Since the arguments before the Court indicate that the relative experience of the men on the seniority roster was unimportant, it is proper to read "1160 days' experience" as meaning only "1160 days of work," or even merely as the elapse of "1160 working days." To attribute the suggested meaning to "1160 days' experience" would not only be consistent with other parts of the 1949 agreement, but also with the practice in the railroad industry to consider length of service as virtually controlling.[15] Relative skill and ability, stressed in many other industries, is given little consideration in the railroad industry.

If that is the proper construction of the agreement and mere passage of time is all that is required to qualify an employee for the higher ranking on the seniority roster, the dictum in the **Oakley** case clearly points to the result reached by the Court. Substitution of military service for "days of work" for purposes of determining seniority standing is then required by both the **Fishgold** and the **Oakley** cases. The "continuous employment" standard is set forth by the Court in its discussion of other landmark

[15] In the course of a debate on the bill in the House, Congressman May indicated that one of the chief purposes of the statute was to preserve seniority rights of the railroad workers. 86 Cong. Rec. 11702 (1940).

cases dealing with the seniority rights of veterans. It reads as follows:[16]

> "We stated, in effect (in Fishgold v. Sullivan Drydock & Repair Corp.) that an honorably discharged veteran, covered by the statute, was entitled by the Act to be restored not to a position which would be the precise equivalent to that which he had left when he joined the Armed Forces, but rather to a position which, **on the moving escalator of terms and conditions affecting that particular employment**, would be comparable to the position which he would have held **if he had remained continuously in his civilian employment.**" (Emphasis added.)

Upon the basis of this analysis it is submitted that the **Diehl** case was rightly decided, and further, that the Court, in its one sentence majority opinion, did not feel compelled to do more than apply well-settled principles to the very narrow issue of whether time spent in military service should be counted toward giving Diehl a higher seniority ranking.

Crucial to a true understanding of the case are certain developments which took place when the case reached the Supreme Court. Although the Railroad had won in the Third Circuit, it assigned all of its argument time to counsel for the Union[17] which had intervened in the case. And counsel for the Union, as a practical matter, eliminated the "experience" of Diehl from consideration in the case.

When the Chief Justice asked whether the Union contended that the other four men were given higher ranking

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[16] Oakley v. Louisville & Nashville R. R., 338 U. S. at 283. Noted in 18 Geo. Wash. L. Rev. 277 (1950).

[17] The Union, System Federation No. 96 of AFL's Railway Employees' Department, intervened in the case as defendant-respondent.

on the seniority roster because they had more experience, the Union attorney conceded that this was not the reason for the intervention of the Union in the case. The Chief Justice then noted that a man who came to the Lehigh Valley Railroad with 25 years of mechanic's experience on another railroad would get no seniority credit for that experience under the 1949 agreement in question. And the Union attorney agreed that he was not interested in classifying people on the basis of greater or lesser experience, but only in an orderly administration of the contract. On the other hand, counsel for Diehl stressed that under the 1949 agreement mere completion of 1160 days of work was sufficient, as a practical matter, to qualify an incumbent of the "temporary car-man mechanic" job for his proper place on the seniority roster. He further asserted that some railroads had done exactly what Diehl was seeking. The Lehigh Valley Railroad reserved no time for presenting its arguments. And the Justice Department in an amicus brief stated that it agreed with Diehl's position.[18]

It is not surprising, therefore, that the Supreme Court found it possible to dismiss this case in a brief per curiam decision. But what did it actually hold? Simply that a veteran is entitled to count military service toward his seniority credit, where the seniority ranking of incumbents of the job to which the returning veteran is restored is dependent upon routine completion of a certain number of workdays, so that his position on the "seniority escalator" will not suffer because of service in the armed forces. Once the case is considered as presenting only that narrow issue, the result is easy under the **Fishgold** and **Oakley** cases.

As a postscript, it should be noted that the opinion of the Third Circuit court of appeals in this case may also

[18] See 35 Lab. Rel. Rep. 410 (1955).

have encouraged reversal of its decision when it states that the dictum of the Supreme Court in the **Oakley** case, quoted supra, cannot be reconciled with the provisions of the controlling statutes. The Third Circuit states:[19]

> "But if we apply literally the test supplied by Oakley we must advance Diehl above the four individual appellees for only so will his position become comparable to that 'which he would have held if he had remained continuously in his civilian employment.' If we adopt this course we must disregard the provisions of Section 8 (c) of the Selective Training and Service Act and of the Selective Service Act of 1948 (the Universal Military Training and Service Act) which provide that the returning veterans 'shall be considered as having been on furlough or leave of absence.' . . . There is a very palpable difference between 'furlough' and 'leave of absence' and 'continuous employment.' If we . . . apply literally the interpretation of Section 8 (c) of the Selective Training and Service Act in the Oakley case, we must treat 'on furlough' and 'leave of absence' as the equivalent of 'continuous employment.'
>
> "We cannot reconcile the irreconcilable."

The Third Circuit then goes on to apply what it calls the express language of the statute. It holds against Diehl despite the absence of any issue as to Diehl's qualifications to perform the work and the absence of any practical problem in this case by application of the "continuous employment" standard of the **Oakley** case. The decision of the Third Circuit was based mainly on a supposed theoretical dilemma, which resulted in accusing the Supreme Court of failure to read the statute correctly in determining Congressional intent. This situation was hardly conducive to the attempt of the Railroad and the Union to secure affirmance of this decision.

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[19] 211 F. 2d at 99.

Significance of the Diehl Case.

To attribute substantial significance to the one sentence majority opinion of the Supreme Court is unwarranted. It probably only reaffirms the prior statements of the Court in the **Oakley** case. When they are taken in context, these statements emphasize that the escalator principle must be applied to grant the veteran such fixed and certain benefits as the veteran would have attained by continuous employment. Obvious examples are seniority credit and benefits automatically flowing from seniority status. The decision in the **Diehl** case cannot be considered as controlling, by necessary implication, other questions of veteran rights. Thus the suggestions of the Solicitor of Labor to the contrary, as contained in an eight page analysis of the **Diehl** case submitted to the Bureau of Veterans' Reemployment Rights, cannot be accepted.[20]

On Furlough or Leave of Absence: Does the decision render meaningless the "furlough or leave of absence" provisions of section 8 (c) of the Selective Training and Service Act of 1940 or its counterpart, section 9 (c) (1) of the Universal Military Training and Service Act? It is submitted that the decision does no such thing, and further, that these provisions can be reconciled, contrary to the position of the Third Circuit, with the "continuous employment" standard of the Supreme Court.

Sections 8 (c) and 9 (c) (1) of the two statutes in question are identical. The crucial part reads:

> Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of

[20] Undated Memorandum from Solicitor of Labor to Robert K. Salvers, Director, Bureau of Veterans' Reemployment Rights, analyzing the *Diehl* case.

training and service in the land or naval forces, shall be so restored without loss of seniority. . . .

Insofar as the Supreme Court merely applies its "continuous employment" standard to the question of measuring the seniority credit of a veteran, it is simply and properly giving greater weight to the more specific Congressional language ("without loss of seniority") than it is to the more general statutory language ("shall be considered as having been on furlough or leave of absence"). If there is any conflict between these two provisions, the Court, under well-accepted principles of statutory construction, must consider the more specific provision as controlling.

It would seem, then, that by virtue of the "without loss of seniority" provision a veteran is entitled to seniority credit for time spent in the armed forces and any benefit which is an automatic consequence, pursuant to custom or the terms of a collective bargaining agreement, of his seniority status. And the "furlough or leave of absence" provisions of the statute are not intended to detract from the seniority or other related and fixed rights of the veteran.

This does not mean, however, that these provisions of the statute are to be ignored. In areas other than seniority credit and automatically attendant benefits, the "furlough or leave of absence" provisions should be considered as part of the "continuous employment" standard. It would seem clear that an employee may remain continuously in the employment of his employer, yet be on furlough or leave of absence. The concepts are not inconsistent. Where questions other than arithmetical calculation of seniority credit or automatic layoffs and promotions based solely on length of service are involved, the courts may properly consider the furlough or leave of absence provisions of the employer as a basis for deny-

ing benefits claimed by the veteran. An obvious example is where the veteran claims that service in the armed forces should be substituted for the necessary experience in a lower rated job to qualify for a higher paying job.

Statutory Protection Beyond One Year: Another interesting aspect of the **Diehl** case is the dates that were involved. Diehl was restored to his former position in November, 1945. Over three years later, the agreement of March 1, 1949 was consummated.

By granting Diehl, as of 1949, the seniority ranking he would have had if not absent in military service, the Court apparently decided that statutory protection still exists, with respect to seniority rights, for at least three years after reinstatment. But again, this principle is not startling, since it had already been held in the **Oakley** case that a veteran's seniority rights are entitled to statutory protection beyond the first year after re-employment. In this respect the Court in the **Diehl** case was also following another well established principle.

One note of caution, however, should be added. While Diehl was still in the armed forces, an agreement, dated August 29, 1944, was reached by the Union and the Company. This agreement provided that the seniority rights of "temporary car-man mechanics" would be determined at the end of the war emergency. During the period between restoration of Diehl to his former job and the agreement of March 1, 1949, this agreement was still pending. Whether the Court would have extended statutory protection beyond three years after reinstatement in the absence of such an agreement is, of course, uncertain.

Effect of Diehl Case on Prior State of the Law.

It is doubtful whether the Supreme Court intended, by its short per curiam decision, to make any change

in the previously existing body of law, except of course to overrule the decision of the Third Circuit in that case. If it had intended to make any significant change in the basic principles which have been developed by the courts, it certainly should have engaged in some sort of helpful analysis which would provide guidance for the lower federal courts in future cases. At least more than one sentence from the Supreme Court should be required for the various courts of appeals to find that any substantial portion of the prior case law has been overruled. Nevertheless, since the Bureau of Veterans' Reemployment Rights has been advised that its previously asserted positions in this area of the law have been reinforced by the **Diehl** case (despite frequent refusals of the courts to adopt the sweeping positions of the Government in seeking relief in behalf of veterans),[21] an analysis of the impact of the **Diehl** case on the principles set forth in leading decisions of the courts of appeals is in order.

At the outset it must be emphasized that two basic distinctions should be kept in mind. First, it should be recognized that different considerations are involved in the situation where a veteran is restored to the position that he left and is merely seeking **seniority credit** for time spent in the armed forces, and the situation where the veteran claims that he has been improperly denied a **higher ranking job** than the one he left for military service. And secondly, a distinction between the situation where a veteran would have obtained a benefit as an "automatic right," and the situation where it is merely

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[21] U. S. Bureau of Veterans' Reemployment Rights, Reemployment Rights Handbook (October 1954), is not completely in accord with the leading decisions of the Courts of Appeal, which deal with veterans' promotion rights. See pp. 85-86. It appears that the Bureau is setting forth in its handbook the positions which it has taken as an adversary in litigation, but which most of the courts have refused to accept when dealing with promotion rights.

conjectural whether the veteran would have obtained the benefit, should be kept in mind.

Many of the actual cases which have come before the courts of appeals have involved only the question of measuring the seniority credit of a veteran. He is not claiming damages because he has been improperly denied advancement to a higher position, but only that he has not been given credit for service in the armed forces. Very few cases have actually required the courts to rule on the right of the veteran to a higher job. But both the majority of the circuit courts of appeal that have been directly confronted with this question, and the majority of those which have passed on this question in dicta, have denied relief to the veteran unless he can show that he would have attained the higher job as a matter of automatic right, either by custom or contract, on the sole basis of length of service.[22] When promotion under a collective bargaining agreement is uncertain and dependent upon qualifications (such as demonstrated, requisite skill and ability) over and above mere length of service, the returning veteran is not entitled, under the applicable statutes, to the higher position. His employer is not required by law to speculate as to whether the veteran would have had the requisite skill and ability at the time of the vacancy in the higher position, or whether the veteran would have had greater skill and ability than other employees who might have bid upon the job.

The following collection of quotations from leading decisions of the various courts of appeals demonstrates

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[22] *E. g.*, Raulins v. Memphis Union Station Co., 168 F. 2d 466 (6th Cir. 1948); Gregory v. Louisville & N. R. R., 191 F. 2d 856 (6th Cir. 1951); Hewitt v. System Federation, 161 F. 2d 545 (7th Cir. 1947).

their strong endorsement of these principles for the past seven years.

(This collection of quotations omitted.)

Different Types of Promotion Clauses.

The Supreme Court has stressed that the applicable statutes use the term "senority" without definition. It has, therefore, concluded that "Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining," and that the Court "must look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran."[31] Hence it is important to note that there are varying types of clauses and practices which determine the relationship between seniority and promotions.

One type of clause or practice grants promotions based on length of service alone. Relative skill and ability of those bidding on the job are not deemed important. Mere passage of time qualifies the applicant for the additional benefits. Where such a contract or practice is shown, the courts should grant a returning veteran a higher rated job where he would have attained it if it were not for service in the armed forces.

A second type of contract clause or practice specifically gives the employee with the highest seniority, who bids on the higher job when it is vacant, a trial period—an opportunity to learn to perform the job, regardless of his existing ability to perform the job. Again, if the returning veteran missed the opportunity only because of military duty, he should be given, upon his return,

[31] Aeronautical Lodge 727 v. Campbell, 337 U. S. 521, 526 (1949).

the trial specifically provided for by the practice or the agreement of the Union and the Company. The veteran should not be denied the opportunity for the reason that he was absent in the armed forces when the vacancy occurred, because here the right to a trial under the contract is an automatic incident of his seniority status. Under the "continuous employment" doctrine of the **Oakley** case, and the "without loss of seniority" provisions of the statutes, the veteran's absence at the time of the vacancy should be excused in this situation.

At the opposite pole from that of automatic right to a promotion based on length of service is the situation where management has complete discretion to promote anyone it sees fit at any time. Here the veteran can claim no "right" to a higher job than the one he left when he entered the service. It should be noted that many agreements make seniority an important factor with respect to layoffs, but not as to promotions.

A fourth type of clause in a collective bargaining agreement makes promotions dependent upon the relative skill, ability, and physical fitness of those who bid upon the higher job. Only if these factors are relatively equal does length of service govern. Under this type of clause seniority and promotion are clearly separable. In fact, it is not even a hybrid, since length of service is not relevant until other crucial determinations are made. This situation is clearly distinguishable from those noted above. That the distinction has merit is indicated by the questions addressed to the counsel for the Union in the **Diehl** case.[32]

Although the courts should not invoke the "furlough or leave of absence" provisions of the applicable statutes

[32] The Chief Justice wanted to know whether the parties were interested in classifying people on the basis of experience.

to deny seniority credit for time spent in the armed forces, or even to deny a benefit which is an automatic incident of seniority (such as promotion based on length of service alone), it is not inappropriate, along with other reasons which may be advanced to support the usual result, to apply these provisions to a situation when promotion is dependent upon relative skill and ability. If the "continuous employment" standard as stated in the **Oakley** case were to be applied to conjectural benefits, then the parties, Union and Company, would be literally required to guess how much skill would have been acquired on the job and to determine whether the veteran would have had greater skill and ability than his successor at the time of the opening on the higher job while he was in the armed forces. Such impossible decisions have not yet been required of Companies and Unions by the courts. Nor is there any reason to suppose that the Supreme Court would adopt such a position if confronted with the issue.

On the other hand, not much would be accomplished by comparing the experience, skill and ability of the veteran at the time he seeks reemployment with that of the employee who has attaind the higher job during the veteran's absence and has been serving in it in the meantime. This merely results in an unfavorable comparison of the veteran's experience and abilities.

The 1954 **Handbook of the Bureau of Veterans' Reemployment Rights** contains the following question and answer:[33]

"Q. Where promotions are made on the basis of seniority, ability, and fitness, and seniority governs as between employees when other factors are equal,

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[33] P. 85.

to what position would an ex-serviceman be entitled upon reinstatement?

"A. If it is shown that he possesses the requisite ability and fitness, he should receive the top position to which a junior employee was promoted during his absence. His seniority in the higher position would be computed as if he had been promoted just ahead of the junior employee. The burden of showing he has the necessary ability is on the ex-serviceman. The burden of showing he is not physically fit is on the employer."

One very serious objection to the Bureau's suggested solution, if the basis for promotions is contained in a collective bargaining agreement, is that the Bureau is rewriting the contract for the parties. There is a well-recognized distinction in industry between a standard which entitles the applicant with the greatest seniority to a vacancy in a higher job merely upon a showing that he is capable of performing the job, and a standard which entitles that applicant to the job only if his skill, ability and physical fitness are relatively equal with that of other applicants. The question in the **Handbook** assumes the latter standard, yet applies the former standard as a solution to the problem. The same objection of changing the mutually agreed to standards is inherent in a solution which would provide a trial period for the veteran to demonstrate his proficiency in the higher job. It must be remembered that Congress did not intend to provide for any greater gains on the "seniority escalator" than the veteran would have had if he had remained in his employment.

Where the contract or custom calls for an automatic promotion or trial period, all serious speculation is removed. Once the principle is decided, application of it is relatively easy. The same is true with respect to the

arithmetical computation of seniority credits. But where the standard for promotion involves relative experience, skill, ability and physical fitness, the problem is much more complex. If the courts grant the returning veteran whatever rights he would have had if he had not served in the armed forces, it is clear that the veteran is only entitled to restoration to his former job with accumulated seniority. This is so, since the necessary speculations would prevent the veteran from showing with any degree of assurance what would have happened had he remained in his employment. Too many judgments on intangible qualities and uncertain circumstances would be involved.

Also, for the courts to require Unions and Companies, in the administration of their collective bargaining agreements, to engage in such speculations upon the veteran's return would provoke unwarranted disharmony in their relationship. Such a holding would encourage the filing of grievances, because of the indefiniteness of the situation. Even if the courts were to settle the date on which the evaluation of relative skills, etc. should be made, the employer would be required to make the necessary determinations with the risk of being charged that he has exercised poor judgment. He might then be faced with claims for back pay by whichever employee lost the higher job. Such policy considerations as these lend support to the view that the veteran must be able to point to something more definite in the contract or practices of his employer than a "relative skill and ability" clause to maintain successfully his claim for greater benefits.

A still further type of clause in a collective bargaining agreement involves the progression of an apprentice to the status of journeyman in a trade or craft job. Although the contract may merely refer to a certain number of hours of work as an apprentice to qualify as a journeyman, it would seem that the real inquiry should be

whether the experience on the job or mere passage of time is the controlling element. If counsel for the veteran and counsel for the Company and Union agree that mere passage of time is sufficient to qualify an employee for a higher status, as was the position of counsel, in effect, in the **Diehl** case in arguing before the Supreme Court, then the court should clearly rule that service in the armed forces may be substituted for service in the plant. On the other hand, where experience on the job is the gist of the practice and the contractual requirement, the courts should not substitute military service for the necessary experience. By deciding the **Diehl** case in one sentence, the Supreme Court would seem to have left prior law on this question undisturbed.

Effect of Section 9 (c) (2) of the 1948 Act.

All of the cases discussed *supra* arose under the provisions of the Selective Training and Service Act of 1940. Neither the United States Supreme Court nor any Court of Appeals has yet been required to determine whether a veteran inducted under the Universal Military Training and Service Act of 1948, as amended, has any greater seniority or promotion rights than veterans covered by the 1940 Act. Since the question has been raised, however, in cases which did not require any ruling on that precise issue,[34] it is safe to assume that in time the courts will find it necessary to reach a decision on this point.

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[34] In Addison v. Tennessee Coal, Iron & Railroad Co., 204 F. 2d 340, 342 (5th Cir. 1953), the court said:

> "Neither do we find, as confidently urged by appellant, that the language of 9 (c) (2) [*sic*] of the Selective Service Act of 1948, is effective as a legislative construction of the former Act, and requires, in this case, the application of different principles than those above referred to."

And in *Nevins v. Curtis-Wright Corp.*, 172 F. 2d 535 (6th Cir. 1949), the court merely stated that the 1948 Act is not retroactive in its effect.

While the language of Section 9 (c) (1) of the 1948 Act concerning the re-employment rights of veterans is the same as that found in the earlier Act, as amended, a further provision was added. Section 9 (c) (2) reads:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraphs (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.[35]

The only opinion which contains any extensive analysis of this section of the statute is that of the Third Circuit Court of Appeals in **Diehl v. Lehigh Valley R. Co.**[36] In that case Chief Judge Biggs comes to the conclusion that the 1948 Act cannot be considered as granting any greater seniority rights to returning veterans than were already granted under the 1940 Act and Section 9 (c) (1) of the 1948 Act. In reaching this conclusion, however, the court first notes the similarity of the language employed by the Supreme Court in the **Oakley** case to that used in section 9 (c) (2). It then decides that the "continuous employment" standard of section 9 (c) (2) and the **Oakley** case is irreconcilable with section 9 (c) (1) of the 1948

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[35] *Boone v. Fort Worth & Denver Ry.*, 223 F. 2d 766 (5th Cir. 1955), quotes this section, but the opinion contains no analysis as to whether a veteran has greater reemployment rights by virtue of this section in the Universal Military Training and Service Act. The case merely holds that a railway telegrapher was not restored to an inferior position or one of different status when the only difference in his former position and that obtained by him after service was in the shift to which he was assigned.

[36] 211 F. 2d 95 (3d Cir. 1954).

Act and its counterpart in the 1940 Act.[37] The court says:[38]

> "We cannot reconcile the irreconcilable. Congressional intent as expressed in the actual words of a statute must, we think, be held paramount to an express Congressional interpretation of that statute even in an immediately following clause."

It is submitted that the court's reasoning is fallacious because it assumes that the "continuous employment" standard of the **Oakley** case and section 9 (c) (2) is irreconcilable with the "on furlough or leave of absence" provisions of the two statutes. Reconciliation is, however, both possible and proper, as indicated *supra* in the discussion of the "on furlough or leave of absence" provisions.

On the other hand, it is submitted that the conclusion that the 1948 Act grants no greater seniority or promotion rights to returning veterans is correct. A considerable amount of evidence may be marshalled to support this position.

In arguing before the Supreme Court in the **Diehl** case, counsel agreed that the case was governed by the 1940 Act. Counsel for the Union, however, added that section 9 (c) (2) of the 1948 Act was merely precatory rather than mandatory, while counsel for the veteran argued that Congress in the 1948 Act adopted the Court's "continuous employment" doctrine under the 1940 Act. Hence, he contended that the doctrine should be followed in this case. Justice Burton then suggested that section 9 (c)

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[37] Since the *Diehl* case actually arose under the Selective Training and Service Act of 1940, the Court's observations as to section 9 (c) (2) of the 1948 Act were unnecessary.

[38] 211 F. 2d at 99.

(2) of the 1948 Act might be a declaration of what Congress had meant all the time.[39] If so, no additional rights were intended to be conferred by Congress in adopting this section.

There is further evidence to support the position that Congress did not intend, by virtue of this section, to grant any greater reemployment rights to veterans who qualify under the 1948 Act. The Senate Report,[40] in commenting upon section 9, refers to section 9 (c) (2) as a "statement of policy regarding application of the 'escalator principle,'" and goes on to state that:

> "This section, which contains 11 subsections, is similar to, but not identical with, section 8 of the 1940 Act. The committee has taken the position that, as a matter of policy, no reemployment rights should be granted to personnel serving under this legislation which would contravene or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 Act. **For that reason no important substantive changes have been made in the provisions of the 1940 Act.** Several procedural changes, which seem to be justified by past experience, have been introduced." (Emphasis added.)

In addition, the Conference Report[41] on the 1948 Act shows that the specific language of the House bill, which granted promotions and accumulations of seniority to veterans to which they would have been entitled if they had been employed continuously, was rejected in favor of the more general policy statement contained in section 9

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[39] See 35 Lab. Rel. Rep. 410 (1955).

[40] S. Rep. No. 1268, 80th Cong., 2d Sess. 15-16 (1948).

[41] H. R. Rep. No. 2438, 80th Cong., 2d Sess. 40 (1948).

(c) (2). A further hint as to Congressional thinking on this matter may be gleaned from the reports on the 1951 amendment. In the Conference Report, it is stated that "existing law permits returning service personnel to be restored to the same position previously held or to a position of like seniority, status, and pay."[42] It is clear that Congress did not believe that the 1948 Act had granted greater seniority and promotion rights to veterans under that Act than those already enjoyed by veterans under the 1940 Act.

Still further evidence that no change in the existing law was intended by the 1948 Act is found by reference to section 9 (d), the enforcement provision. No provision is made for enforcement of section 9 (c) (2). Paragraph (d) reads in part as follows:

> "In case any private employer fails or refuses to comply with the provisions of subsection (b) **or subsection (c) (1)**, the district court. . . ." (Emphasis added.)

If Congress had intended to effect an important substantive change by adoption of section 9 (c) (2), it would have provided specifically for its enforcement as such.

Conclusion.

Although there is respectable opinion to the contrary, it is here concluded that the **Diehl** case has added nothing to the existing body of law with respect to the reemployment rights of veterans. The courts of appeals are free to continue to apply well-established principles governing seniority and promotion rights of returning veterans. No reappraisal of the previously existing body of law on these questions is necessary, at least until the United States

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[42] H. R. Rep. No. 535, 82d Cong., 1st Sess. 22 (1951).

Supreme Court speaks more affirmatively than it has to date.

The provisions of section 9 (c) (1) of the Universal Military Training and Service Act can be reconciled with the **Oakley** case and section 9 (c) (2). And finally it must be concluded that section 9 (c) (2) grants no greater rights to veterans who qualify under the Universal Military Training and Service Act than those enjoyed by veterans who qualified under the Selective Training and Service Act of 1940.

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On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, AS AMICUS CURIAE

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8th day of October, 1963.

THE TOLEDO PRINTING CO.

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BRIEF OF RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, AS AMICUS CURIAE

Preliminary Statement — Interest of the Amicus Curiae.

The Railway Employes' Department, AFL-CIO, on whose behalf as *amicus curiae* this brief is filed, is composed of the following standard national and international railway labor organizations representing, for purposes of collective bargaining under the Railway Labor Act, the so-called shop-craft employees of the great majority of railroads in the United States:

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Brotherhood Railway Carmen of America

International Brotherhood of Electrical Workers
International Association of Machinists
Sheet Metal Workers' International Association
International Brotherhood of Firemen, Oilers,
Helpers, Roundhouse and Railway Shop Laborers

Collective bargaining for these organizations is conducted on a federated basis by said Railway Employes' Department operating through "System Federations" on the properties of the respective carriers, agreements negotiated by such System Federations providing, among other things, for seniority systems and seniority rights of employees in the various crafts represented. In the fulfillment of its representative function the Railway Employes' Department and its System Federations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation or application.

Since the enactment of the Selective Training and Service Act of 1940 and subsequent legislation establishing legally enforceable reemployment rights for persons called from private employment to perform military service, numerous questions have arisen, and a great amount of litigation has ensued, with respect to the particular job status and seniority rights to which the returning veteran is entitled. Such questions have been of particular importance in the railroad industry, with its organization of employees in separate crafts and classes, and confinement of seniority rights to crafts and sub-crafts, and particular points of employment.

Particularly fruitful of continuing litigation have been the claims of returning veterans to be promoted or transferred to positions different from those which they left to enter the armed forces, in either the same or different crafts, and to retroactive or antedated seniority

in the new positions following such promotions or transfers. Such claims, and the continuing litigation, necessarily give rise to uncertainty and insecurity, not to mention dissension, within the employee groups affected, and this situation can only be alleviated by the development of well established principles governing the application of the statutory re-employment provisions to these questionable situations.

In a number of cases in which it has participated, the Railway Employes' Department has taken the view that while the returning veteran must be restored to his former position with full accumulation of seniority credit for the period of his absence in the armed forces, the statutory provisions did not require his restoration to a new or different position, with retroactive seniority therein, simply on the theory that he could, would, or might have been able to obtain such position had he not been absent. Such view was followed by the lower Federal courts with almost complete unanimity until this Court's *per curiam* reversal of the decision of the Court of Appeals for the Third Circuit in *Diehl v. Lehigh Valley R. Co.*, 348 U. S. 960. Though we do not agree that it warrants such construction, the *Diehl* decision has been interpreted by Government counsel representing the returned veterans as a reversal of this previous line of cases, and a resurgence of litigation on this question followed, with resultant conflicting decisions of the courts.

We had felt that these doubts were resolved by the Court's opinion in *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U. S. 263, which appeared to limit the veteran's right to retroactive promotions and seniority status to those situations where the advancement would have accrued to him automatically, as of right, by virtue of his seniority, and to hold that he was not entitled to claim

those changes or advancements in status that he could have achieved only by "experience, effort or chance," or subject to the exercise of managerial discretion. However, the statement of the "Question Presented" in the brief for petitioners herein is substantially indistinguishable from that of Government counsel representing petitioner in the *McKinney* case. The Railway Employes' Department, as collective bargaining representative of both veteran and non-veteran railroad employees, is vitally interested in avoiding continued uncertainty and relitigation of these issues, and the accompanying disruptive effect upon contractual seniority systems whose primary purpose is to afford job security for the people it represents.

ARGUMENT

Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as amended, 50 U.S.C. 459), upon which this action is based, requires that a veteran who had left a position, other than temporary, in the employ of a private employer, must be restored "to such position or to a position of like seniority, status and pay" (Sec. 9 (b) (B) (i)); and that he "shall be considered as having been on furlough or leave of absence" and "shall be so restored without loss of seniority" (Sec. 9 (c) (1)). The same provisions were contained in the Selective Training and Service Act of 1940 (50 U.S.C. App., Sec. 301 et seq.), and subsequently enacted statutes conferring reemployment rights upon veterans.

Applying these requirements to situations like the instant cases, where the veteran is asserting the right to a different or promoted position rather than the one which he left to enter the armed forces, it is our position that he is entitled to the changed or improved status or job only where the right to obtain it would have accrued to him

automatically, as an attribute of his statutorily protected seniority in his old job, had he not entered the armed forces. This seems to us to be the clear meaning of this Court's discussion, in the *McKinney* case, *supra*, of the requirement of restoration "without loss of seniority" — the specific statutory mandate upon which the action was based, and of which the Court said Section 9 (c) (2) of the present Act was an interpretation.

The latter section, added to the statute at the time of adoption of the Selective Service Act of 1948 (62 Stat. 604, 50 U.S.C. App., Sec. 451 et seq.), recites that "It is hereby declared to be the sense of the Congress" that the veteran "should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment". That this language was intended to relate to the previously protected "seniority" of the veteran is confirmed by the statement in the *McKinney* opinion that it was simply the statutory embodiment of the Court's innterpretation in previous decisions of the meaning of the phrase "without loss of seniority". As such, we submit that it does not support a claim to a superior status which the veteran could not have achieved automatically by virtue of his seniority.

Government counsel representing veterans in these and many other cases have consistently sought to attribute a much broader scope to the concept of "continuous employment" embodied in the interpretation, so as to entitle the veteran to all improvements in his status which he could or probably would have been able to obtain by remaining at work on the job. Many promotions or changes in job classifications can of course be achieved only by

completion of a prescribed course of study or training, or the fulfillment of minimum experience requirements. While Government counsel no longer insist, as they did in some of the earlier cases, that time spent in the armed forces must be considered, for purposes of fulfilling such qualification requirements, as time actually worked on the job, they do urge that *after* the returned veteran has completed the necessary working time of course of training, *then* his time in the armed forces must be considered as time on the job, so as to afford him retroactive, statutory "bumping" rights to displace others who had been promoted ahead of him.

This latter position is certainly inconsistent with the argument that "continuous employment" as used in the statute relates to anything but the seniority attributes of the position left by the veteran; for there is nothing in the statute which would authorize deferring the restoration of the veteran to the promoted position if he were entitled to it. But this Court has clearly indicated that the phrase "continuous employment" was not meant to be equated with actual work on the job, but included the concept of an employee on furlough or leave of absence. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275.

The position urged on behalf of the petitioners is further completely inconsistent with the continued presence in Section 9 (c) (1) of the requirement that the veteran "shall be considered as having been on furlough or leave of absence". If continuous employment is to be related to anything but seniority and its attributes, then the quoted phrase is completely without meaning or effect.

That such was not the intent of Congress is apparent, we believe, from the legislative history of Section 9 (c) (2), as well as the care with which the final version was drafted

to avoid conveying the impression that it was intended to create any rights different, or separately enforceable, from the mandates contained in Section 9 (c) (1). These points have been thoroughly developed in the briefs of respondents herein, which also contain extensive citation and discussion of the leading cases in the great body of litigation relating to the issues involved here, and we shall not burden the Court with duplication of arguments already before it.

As noted in our preliminary statement, the present cases appear to us to be an attempt to relitigate issues already decided by this Court in *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U. S. 263. The opinion in that case plainly limits the veteran's right to demand a different or higher position than that which he left, to situations where promotion to that position would have depended "simply on seniority or some other form of automatic progression." And the Court expressly stated that the veteran could not claim what "might have flowed from experience, effort or chance". The fact that in that case the factor which militated against the veteran's claim was the existence of discretion on the part of the employer, so that promotions were based in part at least upon the exercise of judgment as to the employee's relative merit and ability, does not narrow the scope of the Court's decision, and its treatment of Section 9 (c) (2) of the Act as an interpretation of the phrase "without loss of seniority" in Section 9 (c) (1).

We do not understand that petitioners in these cases are disputing the existence of *bona fide* requirements of a specific amount of actual working experience, or completion of a prescribed course of apprentice training, as a condition of qualifying for the promoted positions in question. In such a situation "experience" and "effort" clearly are

mandatory factors in the achievement of the promotion, irrespective of the existence of other speculative factors relied on by the court below and discussed by the parties here. And whether viewed as a matter of foresight or hindsight, it is apparent that these promotions were not to be achieved simply on the basis of "seniority or some other form of automatic progression."

CONCLUSION

The statutory requirements with respect to reemployment of veterans impose, in a sense, a private burden for public service. Praiseworthy though it may be to protect the veteran's right to return to his job, and without having to start again at the bottom of the seniority ladder, this objective normally is achieved only at the expense of loss of employment by a junior employee. This is particularly true in the railroad industry which for years has been drastically reducing its forces rather than hiring new employees.

It is thus vitally important to the employees in a particular seniority group to be able to know whether, and to what extent, their continued future employment might be affected by the return of employees shown on the seniority roster as being on leave of absence in the armed forces. Should the viewpoint urged on behalf of petitioners here prevail, the insecurity of such a position, and the problems of appraising future prospects, would be vastly multiplied. For the reasons stated herein, we believe that Congress wisely refrained from attempting to guarantee to the returning veteran a retroactive reconstruction of a hypothetical civilian employment that would

have such widespread disruptive effects for employers and other employees.

Respectfully submitted,

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Dated at Toledo, Ohio this 8th day of October, 1963.

CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the Railway Employes' Department, AFL-CIO, amicus curiae, do hereby certify that on the 8th day of October, 1963, I served the attached brief of amicus curiae upon all parties of record herein by depositing copies hereof in the United States mails, via airmail, postage prepaid, addressed to Archibald Cox, Esq., Solicitor General; John W. Douglas, Esq., Assistant Attorney General; Alan S. Rosenthal, Esq., and Richard S. Salzman, Esq., Department of Justice, Washington, D. C., 20530, attorneys for petitioners; Herschel H. Friday, Esq., and Robert V. Light, Esq., attorneys for respondent, Missouri Pacific Railroad Company; and to Robert W. Yost, attorney for respondent, Missouri Pacific Railroad Company, 2008 Missouri Pacific Building, St. Louis, Missouri, 63103.

Richard R. Lyman